

No. 14304

United States
Court of Appeals
for the Ninth Circuit

BERNARD HENRY ASHAUER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

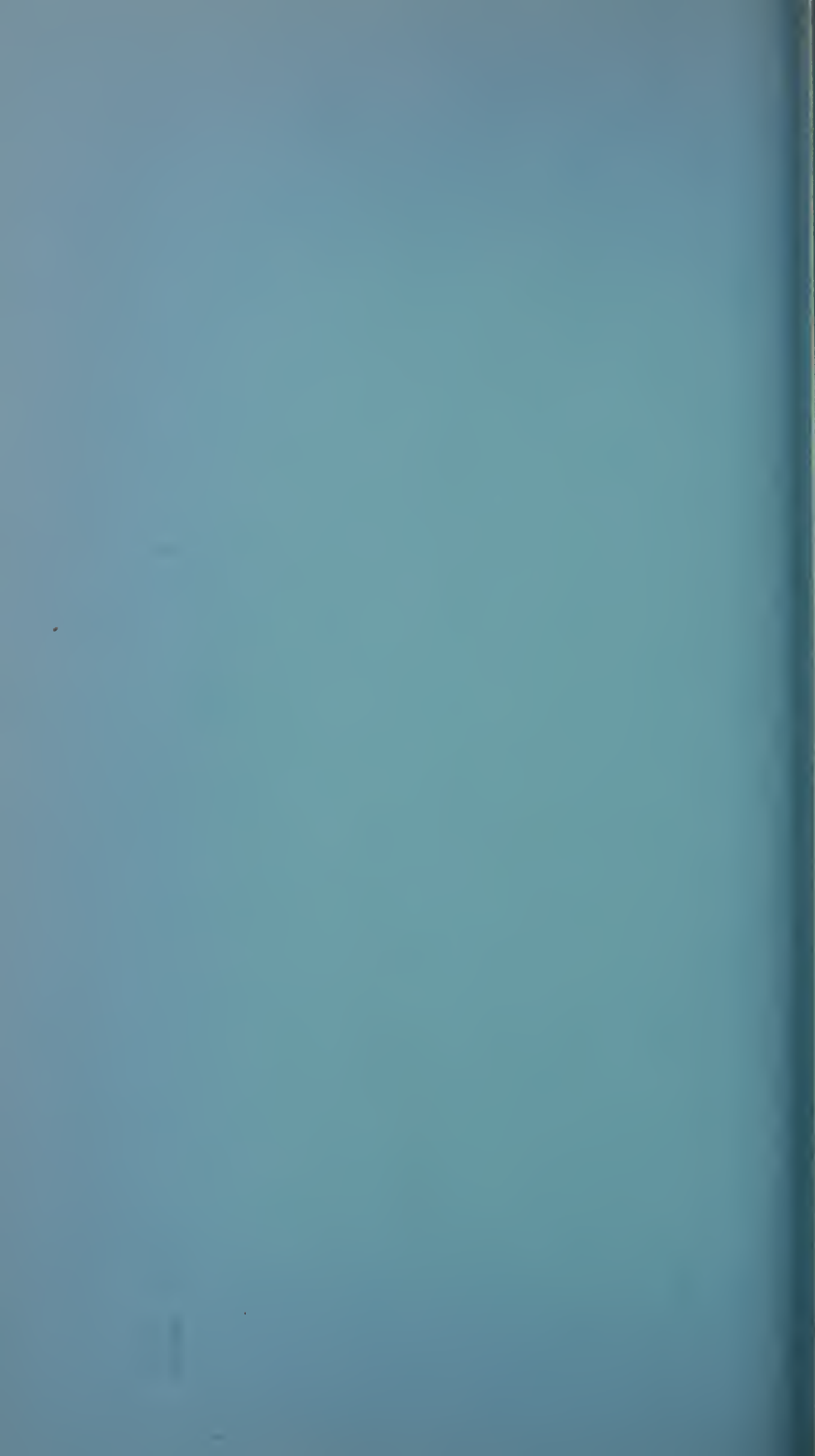
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

MAY 27 1954

PAUL P. O'BRIEN
CLERK



No. 14304

United States
Court of Appeals
for the Ninth Circuit

BERNARD HENRY ASHAUER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Certificate of Clerk.....	98
Extension of Time to Docket Record, Filed December 18, 1953.....	12
Extension of Time to Docket Record, Filed February 9, 1954.....	12
Indictment	3
Judgment and Commitment.....	9
Minute Entry, October 26, 1953.....	8
Minute Entry November 3, 1953.....	8
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	11
Statement of Points on Which Appellant In- tends to Rely on Appeal.....	100
Stipulation Filed September 23, 1953.....	6
Order Re.....	7

	INDEX	PAGE
Transcript of Proceedings.....		13
Witnesses:		
Ashauer, Bernard Henry		
—direct	25, 62,	93
—cross	31,	65
—redirect		39
Lewis, Mary B.		
—direct		45
—cross		49
Pattison, Andrew K.		
—direct		74
—cross		79
Waiver of Jury.....		4

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;
MANLEY J. BOWLER,
Assistant U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the
Southern District of California, Central Division

No. 23002—CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD HENRY ASHAUER,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462, Universal Military
Training and Service Act]

The grand jury charges:

Defendant Bernard Henry Ashauer, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 83, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December

8, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ [Indistinguishable,]

Foreman.

/s/ WALTER S. BINNS,

United States Attorney.

ADM:AH

[Endorsed]: Filed July 22, 1953. [2*]

[Title of District Court and Cause.]

WAIVER OF JURY

The above-entitled cause coming on regularly for trial, defendant being present with counsel, J. B. Tietz, Esq., and the defendant being desirous of having the case tried before the Court without a jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury. The defendant also waives any special finding of facts by the Court.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Dated: 8/25/53.

/s/ BERNARD H. ASHAUER,
Defendant in Pro Per.

I have advised the defendant fully as to his rights and assure the Court that his request for a trial without a jury and waiver of special findings is understandingly made.

Dated: 8/25/53.

/s/ J. B. TIETZ,
Attorney for Defendant.

The United States Attorney hereby waives any special finding of facts and consents that the request of the defendant be granted and that the trial proceed without a jury.

Dated: 8/25/53.

/s/ LAUGHLIN WATERS,
U. S. Attorney,

By /s/ EDWARD J. SKELLY,
Assistant U. S. Attorney.

Approved:

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed September 23, 1953. [4]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Bernard Henry Ashauer, Defendant, in the above-entitled matter, through their respective counsel, as follows:

That it be deemed that the Clerk of Local Board No. 83 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Bernard Henry Ashauer, is a registrant of Local Board No. 83.

3. As Clerk of Local Board No. 83, she is legal custodian of the original Selective Service file of Bernard Henry Ashauer.

4. The Selective Service file of Bernard Henry Ashauer is a record kept in the normal course of business by Local Board No. 83, and it is the normal course of Local Board No. 83's business to keep such records. [5]

It Is Further Stipulated that a photostatic copy of the original Selective Service file of Bernard Henry Ashauer, marked "Government's Exhibit 1" for identification, is a true and accurate copy of the contents of the original Selective Service file on Bernard Henry Ashauer.

It Is Further Stipulated that a photostatic copy

of the Selective Service file of Bernard Henry Ashauer, marked "Government's Exhibit 1" for identification, may be introduced in evidence in lieu of the original Selective Service file of Bernard Henry Ashauer.

Dated this 22nd day of September, 1953.

LAUGHLIN E. WATERS,
United States Attorney;

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division;

/s/ EDWARD J. SKELLY,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ J. B. TIETZ,
Attorney for Defendant.

/s/ BERNARD H. ASHAUER,
Defendant.

ORDER

It Is So Ordered this 23rd day of September, 1953.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed September 23, 1953. [6]

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 26, 1953

Present: The Hon. Harry C. Westover,
District Judge.

Defendant present on bond.

Proceedings: For further trial (ruling on motion for acquittal and/or decision.

It Is Ordered that the motion for acquittal is denied.

It Is Ordered that the cause is continued to November 3, 1953, at 10:00 a.m. for further trial.

EDMUND L. SMITH,
Clerk.

By E. M. ENSTROM, JR.,
Deputy Clerk. [7]

[Title of District Court and Cause.]

MINUTES OF THE COURT—NOV. 3, 1953

Present: The Hon. Harry C. Westover,
District Judge.

Defendant present on bond.

Proceedings: For further trial.

Court orders cause continued to 2 p.m.

At 2 p.m. Court reconvenes herein, and case is reopened.

Bernard Henry Ashauer is called, sworn, and testifies in his own behalf. Defendant rests.

Attorney Tietz, for defendant, renews motion for judgment of acquittal.

Court Orders said motion Denied.

It Is Ordered that cause is continued to Nov. 4, 1953, 10 a.m., for further trial.

EDMUND L. SMITH,
Clerk,

By E. M. ENSTROM, JR.,
Deputy Clerk. [8]

United States District Court for the Southern
District of California, Central Division

No. 23,002—Criminal

UNITED STATES OF AMERICA,

vs.

BERNARD HENRY ASHAUER.

JUDGMENT AND COMMITMENT

On this 5th day of November, 1953, came the attorney for the government and the defendant appeared in person and by counsel, J. B. Tietz, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a finding of guilty of the offense of unlawfully failing on Dec. 8, 1952, in Los Angeles County, Calif., to be inducted into the armed forces of the United States as so notified and ordered to do, in violation of

U.S.C., Title 50, App., Sec. 462, Universal Military Training and Service Act, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years.

It Is Adjudged that execution of sentence is stayed and defendant is allowed to remain on bond pending filing of notice of appeal and application for bail pending appeal; said stay of execution, however, is not to extend beyond Nov. 23, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ HARRY C. WESTOVER,
United States District Judge.

The Court recommends commitment to Federal Road Camp, Tucson, Ariz.

[Endorsed]: Filed November 5, 1953. [10]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Bernard Henry Ashauer, resides at 5259 Sepulveda Boulevard, Van Nuys, California.

Appellant's Attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462, Selective Service Act, 1948, as amended.

On November 5, 1953, after a verdict of Guilty, the Court sentenced the appellant to three years' confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,

Attorney for Appellant.

[Endorsed]: Filed November 9, 1953. [11]

[Title of District Court and Cause.]

EXTENSION OF TIME TO DOCKET RECORD

For good cause shown defendant-appellant is hereby given 50 additional days, to and including February 14, 1954, to prepare and docket the record on appeal.

Dated: December 18, 1953.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed December 18, 1953. [12]

[Title of District Court and Cause.]

EXTENSION OF TIME TO DOCKET RECORD

For good cause shown defendant-appellant is hereby given 50 additional days, to and including April 5, 1954, to prepare and docket the record on appeal.

Dated: February 9, 1954.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed February 9, 1954. [13]

In the United States District Court, Southern
District of California, Central Division

No. 23002—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD HENRY ASHAUER,

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

September 23, 1953

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney; by

EDWARD SKELLY,

Assistant United States Attorney.

For the Defendant:

J. B. TIETZ, ESQ.,

257 South Spring Street,

Los Angeles, California.

September 23, 1953, 10:00 A.M.

The Clerk: No. 23002, United States vs. Bernard
Henry Ashauer.

Mr. Skelly: Ready for the government.

Mr. Tietz: Ready for the defendant.

The Court: You may proceed.

Mr. Skelly: Your Honor, the government requests the court to permit the government to mark Selective Service file of Bernard Henry Ashauer for identification.

The Court: It may be marked as Government's Exhibit No. 1 for identification.

The Clerk: Plaintiff's Exhibit No. 1 for identification, your Honor.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Mr. Skelly: The government and the defendant, Bernard Henry Ashauer, through his counsel, have entered into the following stipulation:

It is hereby stipulated and agreed by and between the United States of America, plaintiff, and Bernard Henry Ashauer, defendant, in the above-entitled matter, through their respective counsel, as follows:

That it be deemed that the clerk of Local [3*] Board No. 83 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Bernard Henry Ashauer, is a registrant of Local Board No. 83.

3. As clerk of Local Board No. 83, she is legal custodian of the original Selective Service file of Bernard Henry Ashauer.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

4. The Selective Service file of Bernard Henry Ashauer is a record kept in the normal course of business by Local Board No. 83, and it is the normal course of Local Board No. 83's business to keep such records.

It is further stipulated that a photostatic copy of the original Selective Service file of Bernard Henry Ashauer, marked Government's Exhibit 1 for identification, is a true and accurate copy of the contents of the original Selective Service file on Bernard Henry Ashauer.

It is further stipulated that a photostatic copy of the Selective Service file of Bernard Henry Ashauer, marked Government's Exhibit 1 for identification, may be introduced in evidence in lieu of the original Selective Service file of [4] Bernard Henry Ashauer.

Dated this 22nd day of September, 1953.

We move, your Honor, to have the court accept this stipulation.

The Court: The stipulation may be filed.

Mr. Skelly: We further move to have Government's Exhibit 1 for identification received in evidence.

The Court: It may be marked in evidence.

The Clerk: So marked, your Honor.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

Mr. Skelly: The government rests, your Honor.

Mr. Tietz: Your Honor, Mr. Skelly, the govern-

ment, having rested, the defendant moves for a judgment of acquittal on the ground that the evidence introduced by the government, the Selective Service exhibit, shows a number of denials of due process of law, and these denials the defendant wishes to bring to the court's attention.

The defendant claims that each of them invalidates the order to report, and being a void order, he is not required to obey it.

The Court: If you can show me where any such denial is, I will grant your motion. You show me in the record where there has been a denial of due process.

Mr. Tietz: I will have five denials to argue to your [5] Honor. I will state them so that your Honor will have in mind what I am aiming at generally, as well as specifically, and so the government can follow, also. Each one of them, I would like to present the portion of the evidence that supports the point, and I would like to present the cases that support my argument.

The first is that the record, the exhibit, shows indisputably that in the personal appearance hearing, a prejudiced attitude was exhibited against this registrant, prejudiced to such a degree that there should be no question but that they did not have the proper semi-judicial attitude that a local board must have in judging a man.

The Court: May I ask you a question? Inasmuch as you represent a number of these defendants and inasmuch as, possibly, the arguments will

follow the same line, do you contend that this was a personal prejudice?

Mr. Tietz: Yes, sir.

The Court: Or was it a prejudice because he claimed to be a conscientious objector? Was it a personal prejudice against the individual?

Mr. Tietz: I am only speculating on that, but I would say from the words used, "You are yellow, that is why you want this deferment, you are yellow," that that is personal.

The Court: Is it because he is claiming to be a conscientious objector? [6]

Mr. Tietz: Yes. So to that extent it may be it was a class hatred or group hatred exhibited by that statement.

The Court: May I ask you another question? Are these people you represent a member of any particular sect or religious group?

Mr. Tietz: Yes.

The Court: What is it?

Mr. Tietz: This defendant is a member of Jehovah's Witness.

The Court: Is it your point of view on this prejudice that when a Jehovah's Witness asks to be classified as a conscientious objector and it is denied, that that is a prejudice? Is that your theory?

Mr. Tietz: Not in this case. There have been cases, although I don't think there will be one of them in the seven or eight or nine, whatever it is, in this group that are to be tried more or less consecutively, I don't think I have the good fortune

to be able to demonstrate that that is true here. It so happens in this particular case that I can point to the page and line in a few moments where that prejudice is shown toward this defendant.

The Court: Let me have your other points.

Mr. Tietz: The next point is that at the personal appearance hearing he was denied permission to introduce new evidence to the extent that he wanted to, which was a reasonable [7] extent. I will show the facts on that and I will give some cases, one recent appellate decision, not yet in the advance sheets even, although I think counsel will stipulate that the copy I have is correct.

The Court: Let's have the evidence and then we will go into the cases.

Mr. Tietz: I thought I would first run over these points and then I will go back over each one individually.

The Court: All right.

Mr. Tietz: My next ground for a motion is that he was reclassified to 1-A on November 20, 1951, from the 4-E classification in which he had been on January 16, 1951, without any new evidence appearing in the file, so that they had no jurisdiction to act. It was obviously whimsical.

The next point I wish to make——

The Court: Just a minute. I want to ask you a question, Mr. Tietz.

Mr. Tietz: Yes.

The Court: You mean to say you believe if the board classifies a registrant today, that that classi-

fication must stand forever, that it cannot be changed?

Mr. Tietz: No, the regulations specifically say no classification is permanent. That is the only regulation that is that short.

The Court: Does the regulation say you can't change a [8] classification without receiving any evidence?

Mr. Tietz: There is no regulation that puts it in those words, but there are regulations, and there are many court decisions that say this. The registrant must within 10 days after any change of circumstances, he moves, his employment—let us say that I should say that, because it isn't important in our discussions whether he moved or hadn't, but if he changes his type of employment, if he changes his marital status, if he is a father and his child dies so he no longer enjoys the fatherhood deferment, he must tell the board.

The Court: That must become of record.

Mr. Tietz: Yes, sir. The classification, new classification can be made only on the written record. If the board learns of anything orally, they must reduce it to writing and place it in the files. Those are the regulations.

The Court: If I understand your point correctly, he was classified 4-E.

Mr. Tietz: Yes, sir.

The Court: Without any new evidence before the board or without anything in the record they arbitrarily changed it to 1-A, is that right?

Mr. Tietz: Yes, sir.

The Court: All right. Let's go to the other point.

Mr. Tietz: I am basing that point more on that they had no jurisdiction than I am on the arbitrariness, although that [9] enters into it, because my fifth point is going to be arbitrariness to cover the over-all situation, which is a separate point altogether.

The Court: What is No. 4?

Mr. Tietz: No. 4 is that both the hearing officer in his advisory opinion to the Attorney-General, and the Attorney-General in his recommendation to the appeal board based their opinions and their recommendations on an illegal basis. I will point out precisely what the illegal basis is and I will argue it. Although your Honor may not agree with me, the Department of Justice, surprisingly enough, has come around to my point of view. At that time they had a different opinion. I will also argue when I come to that point in argument that I do not have to show that the appeal board relied on that. All I have to show is that that was placed before them, and then it is up to the government, if it can, to show that it did not rely on it. I will come to that a little later.

My fifth point is that the evidence in this file shows that the 1-A classification was arbitrary, and that will require quite a bit of argument and quite a bit of citation from the authorities, because this point is a more difficult point to persuade a district court on than any of the others. You might say it is taking it the hard way. I think there are a dozen and a half important decisions solely on that point,

where the district court has come out and said, [10] "Much as I dislike to say it, the administrative agency acted arbitrarily, the file shows nothing else but that; therefore I grant the motion for acquittal," or in some cases the Court of Appeals has reversed them.

Now, your Honor, I will proceed to the argument on this point.

(Argument.)

The Court: I will take the motion under submission. We will recess now until 2:00 o'clock, but we will proceed with the other case.

Mr. Tietz: We haven't rested.

The Court: You have made a motion.

Mr. Tietz: Yes, on the government's evidence.

The Court: On the government's evidence, yes. If I grant your motion, you don't have to go further.

Mr. Tietz: But if the court doesn't—

The Court: If the court doesn't grant the motion, he will give you opportunity to present any evidence you have, but I want to proceed this afternoon with the other case. I will take your motion in this case under submission so I will have a chance to read these decisions.

Mr. Skelly: Will this case 23002 be continued to a later date, if your Honor is going to hear the other one?

The Court: If I don't grant the motion of the defendant, the case will be continued to a later date for further [11] testimony. All I have before me is the government's case. The government has

no more evidence. If I determine that there has been an abuse of due process, if that abuse hasn't been cured by the appeal board, then I will have to grant the defendant's motion. If I find there has been no abuse of due process, or if there was an abuse, it was cured, then I will deny the motion and we will proceed to hear the testimony.

Court will now stand in recess.

(Thereupon an adjournment was taken sine die.) [12]

October 26, 1953, 2:00 P.M.

The Clerk: No. 38, 23002, United States vs. Bernard Henry Ashauer, further trial.

Mr. Skelly: Ready.

Mr. Tietz: Ready for the defendant and the defendant is present.

The Court: Now, Mr. Tietz, what is the problem here?

Mr. Tietz: If the court agrees with me that there were some apparent denials of due process, then we have no further problem.

The Court: What is the denial?

Mr. Tietz: There were five I brought to the attention of the court in my argument. Arbitrariness——

The Court: Arbitrariness of whom?

Mr. Tietz: Everybody.

The Court: Of the appeal board?

Mr. Tietz: Whenever everybody overlooks the facts, then they are all arbitrary, your Honor.

The Court: Even the court?

Mr. Tietz: Most assuredly. I would use a different word. The court then is using judicial discretion. There is the same illegal basis, because he believed in self-defense. The hearing officer and the Attorney-General thought they couldn't help him, but the main thing that interested the court was my [13] point three, and that is that they reclassified him, the local board, from the complete conscientious objector classification which he received January 16, 1951, on November 20, 1951, with no new evidence placed in the file to show that they had jurisdiction to do so.

(Further argument.)

The Court: It is my opinion when the board makes a classification, it is not estopped from reconsidering that classification, that it can reconsider the facts before it and come to a different conclusion. Consequently, I will deny the motion for an acquittal.

Mr. Tietz: Before your Honor speaks further on this point, let me recall to your Honor we are not through with the case. We merely heard the government's testimony.

The Court: Have you got any testimony?

Mr. Tietz: Oh, yes, and I have got some more points to bring up.

The Court: We will set the matter down for further trial next Tuesday, a week from tomorrow.

Mr. Tietz: At 2:00 o'clock?

The Court: At 10:00 o'clock in the morning.

(Whereupon, an adjournment was taken to November 3, 1953, at 10:00 o'clock a.m.) [14]

November 3, 1953, 2:00 P.M.

The Clerk: No. 8, 23002, United States vs. Bernard Henry Ashauer.

Mr. Mitsumori: Ready for the government.

Mr. Tietz: Ready for the defendant. The defendant is present in court.

Mr. Mitsumori: I understand, your Honor, this is a continuation from last week.

The Court: My understanding is that the government has presented its testimony and rested. The defendant has made a motion.

Mr. Mitsumori: Yes.

The Court: Mr. Tietz indicated they had other evidence they wanted to introduce.

Mr. Tietz: Yes, your Honor. In connection with the motion, I do not recall what disposition your Honor made. I think your Honor took it under submission and was reserving decision until the end of our case and your Honor then might possibly pass favorably on one of the five points I brought up in the first motion, because my second motion will have five new and different points.

Mr. Mitsumori: I understand, your Honor, the motion had been acted upon and denied.

The Court: Mr. Tietz, you ought to save some points for [16] another case. You know, you oughtn't to give all your points in one case.

The Court: Sometimes when the boards go

wrong, as in this case, they go very wrong, so there are ten points.

The Court: Let's start out and dispose of your points.

Mr. Tietz: Will you take the stand, please, Mr. Ashauer.

BERNARD HENRY ASHAUER

called as a witness herein by and in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated, please. Will you state your name?

The Witness: Bernard Henry Ashauer.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case, are you not? A. That's right.

Q. In November of 1951 you received a 1-A classification notice from the local board, did you not? A. That's right.

Q. That was after you had had a 4-E classification for perhaps 11 months or a year?

A. That's right.

Q. Did you have a personal appearance before the local [17] board? A. Yes, I did.

Q. Why did you ask for that hearing?

A. I asked for that hearing because I wanted to know why I had a 4-E for a whole year and all of a sudden they would change it to a 1-A.

(Testimony of Bernard Henry Ashauer.)

Q. When you came to the hearing, did you put that question to the local board members there?

A. Yes, I did.

Q. How many local board members were there?

A. There were three, and one girl taking notes.

Q. The girl was the clerk of the board, was she not? A. Yes, I think so.

Q. Did you attempt to discuss this situation of your Selective Service file with these three board members? A. Yes, I did.

Q. What happened when you attempted to discuss your file and the classification situation?

A. Well, actually, they didn't answer my questions very well.

Q. What do you mean by "your questions"? What question did you ask them?

A. Like I asked them why I was 4-E and then they made me 4-A. I could never get a—how would I say it, an answer, why they did that. [18]

Q. What did they say when you asked them?

A. One person popped up and said, "I guess I got three boys over there and you should be there, too," and made other statements, and one pointed over there and said, "You are just plain yellow for not going in."

Q. Tell me this, in discussing the file, that is, in discussing your file, tell me this, did you try to discuss the contents of your file with them and point out certain things to them?

A. Yes, I did.

Q. Did they let you do it?

(Testimony of Bernard Henry Ashauer.)

A. No, they didn't.

Q. In what way wouldn't they let you do it?

A. Well, every time I would have a point or something and would try to talk to them, they always had something else to say, and they would never—how would I say—stick to the point. If I would ask them a question or something, they would always go around to something else and I could never get a direct answer from them.

Q. Then you mean you did not get to discuss the facts in the file with them?

A. That's right.

Q. Did you try to point out to them that the views that you had with respect to conscientious objection at the time of your personal appearance were the same as the views that you [19] had when they gave you a 4-E classification?

A. That is true.

Q. When you tried to do that, what happened?

A. Well, again, like I said, they misinterpreted what I tried to say. When I tried to use the Bible, they wouldn't let me use the Bible for my defense, because they said it could be interpreted any old way.

Q. At this hearing, did you try to present any evidence before them? A. Yes, I did.

Q. In what way did you try to present any evidence

A. I had some booklets, as I can recall the names, God and the State, and Neutrality, and one other, I believe, is called Loyalty. Well, all these

(Testimony of Bernard Henry Ashauer.)

booklets were—how would I say?—all the writings in these booklets were the same thing as I would try to say to them if they would give me a chance to.

Q. You mean these booklets express your own views? A. That's right.

Q. Was there anything in these booklets that was new or different than what you had already given them? A. Yes, it would be.

Q. What happened when you tried to give these booklets to them?

A. They said it would make the file too full and they [20] couldn't accept them.

Q. Did they accept them?

A. No, they did not.

Q. Did they accept any papers at all from you?

A. Yes, they did. I had some affidavits.

Q. Under what circumstances did they accept those papers?

A. They took them because they said they weren't bulky to handle and they would fit in the file nice.

Q. Did they take them the first time you offered them? A. No.

Q. How did they happen to take them?

A. I told them according to the law, as I thought, they should take them and that I was going to write to Brother Covington about them.

Q. Who is Brother Covington?

A. He is a lawyer for the Society.

Q. You mean W. C. Hayden, of the Watchtower Society in Brooklyn? A. Yes.

(Testimony of Bernard Henry Ashauer.)

Q. Did you say anything to them about 4-E and 1-O being the same classification?

A. Yes, I did, but when I told them I thought the 4-E should be the same as a 1-O, they didn't know what that was.

Q. Do you mean they didn't know what it [21] was?

A. They had their records before them and when I—well, when I told them about that 1-O, they didn't know what it was and they didn't know what that particular classification was at that time, so they had their little book at that time and they had to look it up, and by that time somebody else had something else to say and they didn't go back to the point.

Q. Did you say anything about taking a 1-O classification?

A. Yes, I did. I said I would be willing to accept that.

Q. In connection with trying to give them any evidence you mentioned something before about trying to use your Bible. What happened in connection with that?

A. Well, as this was my only defense, I tried to use the Bible, and they said it can be interpreted any old way, so we don't want to hear it.

Q. Were you wanting to use the Bible to explain the religious basis for your conscientious objection to participation in war?

A. That's right.

(Testimony of Bernard Henry Ashauer.)

Q. They said they didn't want to hear it, is that it? A. That is correct.

Q. You mentioned something before about the attitude of these board members, something about yellow. Tell us what happened in connection with that. [22]

A. As we were talking, they asked me why I didn't want to go in, and I told them because of my beliefs. One board member just pointed over to the desk and said, "You are just plain yellow, that is why you don't want to go in."

Q. What do you mean by he pointed to the desk?

A. I was sitting there and he reached over and pointed his finger at me.

Q. He reached over the table and pointed his finger at you?

A. He reached over the table and pointed his finger at me and said, "You are plain yellow."

Q. Did anybody apologize for his statement?

A. No, they didn't.

Q. You had a hearing before a hearing officer, didn't you, for the Department of Justice?

A. That is correct.

Q. At that hearing, did he tell you what information they had that the FBI had dug up against you? A. Yes, he did.

Q. What were the circumstances?

A. He said that there were two people, I think, that says, "If provoked to anger, would kill," but he could not give out the names.

Q. So you didn't get the names and addresses?

(Testimony of Bernard Henry Ashauer.)

A. No, I didn't. [23]

Q. Did he say he would not give you the names and addresses?

A. That's right. When I first walked in, he said, "I can tell you your record is all pretty good except those two. I can't give you the names and addresses to that particular extent."

Mr. Tietz: You may cross-examine.

Cross-Examination

By Mr. Mitsumori:

Q. Mr. Ashauer, when you appeared before the board for your personal appearance, didn't the board members give you an opportunity to describe to them the basis of your belief for the classification you desired?

A. When I first went in there, they asked me, and that is what I told them. Like I said, it was my hearing, and I asked them why I was 4-E for a while and then they made me 1-A.

Q. Did they give you an opportunity to expound your views?

A. Yes, to a certain extent they did.

Q. To what extent?

A. Well, like I asked them why, and then they started talking about all this kind of thing. [24]

Q. Did you get an opportunity to express your views on why you felt you should be entitled to 1-O or 4-E classification?

A. Well, when I first came in, I told them I

(Testimony of Bernard Henry Ashauer.)

was entitled to 1-O, and for a few minutes they did listen.

Q. Did you state the basis for your belief?

A. Yes, I did, that I was raised from childhood on.

Q. As a what?

A. As a Jehovah's Witness.

Q. Did you tell them that your father and mother were both Jehovah's Witnesses?

A. Yes, I did.

Q. And that you had been brought up in that sect by your parents? A. That is correct.

Q. Did you bring the Bible with you?

A. Yes, I did.

Q. Did you quote from any portion of the Bible?

A. No, sir, because they wouldn't let me do so.

Q. Did you use any expressions that are found in the Bible as the basis for your belief?

A. Well, like I said, at my hearing I didn't have much to say because every time I would say something, they would bring up other points.

Q. What other points would they bring up? [25]

A. Well, when I tried to explain to them from the Bible I believed this world was under a system of the devil, because it wouldn't be under God, He wouldn't permit wars; things like that, before I could say anything, one person said, "Why don't you tell Truman he is a devil?" I mean speaking like that. I would try to say something and they would more or less misinterpret what I said.

Q. Isn't it a fact that you made a statement to

(Testimony of Bernard Henry Ashauer.)

the board to the effect that the Bible states, "Thou shalt not kill," and that is the basis of your objection? A. That's right.

Q. And you had an opportunity to make that statement, did you not? A. Yes.

Q. Isn't it a fact that that is one of the bases for your objection to the 1-A classification?

A. That is correct.

Q. That is the teaching in the Bible, that "Thou shalt not kill"? A. That is correct.

Q. Isn't it a fact that at that hearing you had an opportunity to present additional evidence?

A. All I could present was three pieces of paper that, you know, that people would write concerning my behavior in my company, and so forth, and that's all they would take. [26]

Q. Weren't there four letters, one from Mr. Floyd Kite, Jr.? A. Yes.

Q. And also one by Mr. Norman Walter?

A. Yes, there is one from him.

Q. And also one by Vernon C. Kern?

A. Yes.

Q. You also presented, I believe, a letter or a copy of a letter signed by C. B. Cates?

A. Yes.

Q. General, U. S. Marine Corps?

A. That is correct.

Q. You had an opportunity to present each of those documents?

A. Yes, at that particular time. I can't remember, like I say, how many there were. I thought

(Testimony of Bernard Henry Ashauer.)

there were three but actually those are all in there.

Q. You presented those letters as part of your evidence to sustain your 1-O classification?

A. That is correct.

Q. You did that?

A. That's right, and my background, and so forth, like that.

Q. How long would you say that the hearing took place? A. 15 minutes. [27]

Q. Did you have everything you wanted to say at that time?

A. To an extent, yes, because, like I say, I could talk only on certain points. If I would try to present something on my belief, they would come up with other things that weren't in the case.

Q. Those other things, would they have been questions related to what you had stated to them?

A. As I can remember, I would be talking and one would say, "Well, this is right, this is the organization that doesn't want to salute the Flag," and like that. They always went off on different points, not the point why I was a 4-E once and then I was made a 1-A.

Q. At the time of the hearing, were you employed, Mr. Ashauer? A. Yes.

Q. Where were you employed?

A. I believe I was employed as a mechanic helper. It is on Burbank Boulevard, in North Hollywood.

Q. Were you about that same period of time not employed by General Motors?

(Testimony of Bernard Henry Ashauer.)

A. That is correct.

Q. Chevrolet Division of General Motors?

A. That's right; when I first got out of school, I worked there. [28]

Q. If I might refresh your recollection, at the time you submitted your questionnaire to the draft board, were you not employed at the General Motors? A. That's right, I think so.

Q. Mr. Ashauer, I have got this photostatic copy of your file. Let me show you pages 20 and 21. This appears to be a pamphlet of the Jehovah Witness sect, is that correct? A. That is correct.

Q. On page 21, here is another pamphlet, known as the Watchtower. A. That's right.

Q. Were these offered by you to the draft board at the time of the hearing, as near as you can recall? A. Yes, I think so.

Q. In other words, you presented these to the draft board at the time of your personal appearance here? A. Well——

Mr. Tietz: Let him examine the file.

The Witness: Well, I believe I did present some things. I don't know when these were, but they did accept these two.

Mr. Mitsumori: They did accept them?

Mr. Tietz: Suppose you examine it and see in what connection those two sheets may have been presented.

The Witness: Well, as I recollect now, they were willing to take this particular magazine, too, be-

(Testimony of Bernard Henry Ashauer.)

cause it is a thin [29] magazine and it doesn't take up too much space, and it is Why Jehovah's Witnesses are not Pacifists. They were willing to take this one here, because it is a small booklet. The others they refused to take because they took up too much space in the file.

Q. (By Mr. Mitsumori): How many pages were the other pamphlets you had submitted?

A. Oh, maybe 30 pages in the book, just a small one, and the other might have been 18 or 20.

Q. Contrary to the statement you gave on direct examination, they did give you an opportunity to present these two pamphlets?

A. Well, after I told them that I was going to call up or I was going to write, and then when they heard that, they figured they'd better take some, so they did take some, those two pamphlets, or maybe three or four. I am not positive what it was.

Q. These pamphlets pretty well express the views of your body? A. No.

Q. The Watchtower—

A. The other two I had would have been better.

Q. They would have been better?

A. They would have given quotations from the Bible. I mean that is what they are actually for in case of a draft or [30] something, a person can take a look at the magazine to get a better understanding.

Q. Now, do you object to war in any form, participating in war in any form?

A. Yes, I do.

(Testimony of Bernard Henry Ashauer.)

Q. Would you participate in any warfare in which the Jehovah state might be involved?

A. Well, you could make all this a warfare, to try to say you win a case, or something like that, but actually not to go out and more or less kill anybody, no.

Q. In other words, if, for example, if I may put it this way to you, if Communists attempted to destroy Jehovah's Witnesses, would you take arms to combat them, to combat such a force as Communism, to preserve the state of Jehovah?

A. No, sir, I wouldn't. The only time you could do that would be, if you know the Bible back there in the time when the Israelites were the chosen people, they had a right to defend themselves because they were ruled by God, theocratic war.

Q. If God chose that Jehovah's Witnesses should participate in theocratic war, would you do so?

A. I don't know exactly, no, because I wouldn't know when there was——

Q. Assuming that he did, God did, command theocratic war?

A. I mean I don't understand what you mean there.

Q. I mean if in the event the Jehovah's people were [31] attacked, an evil force attempted to destroy Jehovah's people, would you, as a Jehovah's Witness, take arms to preserve your people and your belief that you do believe in?

A. Well, I would have to say no, because it was

(Testimony of Bernard Henry Ashauer.)

at the time during the last war, they were all in prison, too, under Hitler, and the people refused to take up arms, so, therefore, they were put into concentration camps.

Q. But during the last war Jehovah's people were not being attacked by Hitler.

A. Not necessarily like that, but it is like where all they had to do was sign a piece of paper saying he was the higher power and they refused to do that, because they know there is only one power.

Q. It is your belief you would not participate in any way, in any form, directly, or indirectly, is it not?

A. That is correct.

Q. Even to the extent of participating in the war effort in a civilian capacity, working in defense industry?

A. That is true because I consider if you are working in a defense plant, you are making bullets, and so forth, provided for men to use, but I would be willing to do some other kind of work.

Q. Were you aware General Motors is one of the largest wartime contract holders?

A. Yes, sir, but when I was working there, we were [32] making cars for personal use for people. They were not making any kind of war material.

Mr. Mitsumori: No further questions.

(Testimony of Bernard Henry Ashauer.)

Redirect Examination

By Mr. Tietz:

Q. Mr. Mitsumori asked you about pages 20 and 21 of the exhibit. Did you notice whether or not pages 20 and 21 included all the material that you gave them in the two pamphlets called *God and the State* and the *Watchtower* of February 1, 1951?

A. No. This is just a cover of the book, and so is this.

Q. In other words, I understand by your answer that page 21 is merely a cover of that issue of the magazine?

A. And so is this.

Q. And the last page?

A. Correct.

Q. Page 25, if you will look at it, is the local board version of what took place at this personal appearance hearing of December 4, 1951, is it not?

A. Yes, it is.

Q. Mr. Mitsumori asked you whether or not it was correct that at this hearing you stated that the Bible says, "Thou shalt not kill." [33]

A. That is correct.

Q. Later on he asked you whether or not you objected to all kinds of participation in warfare?

A. That is correct.

Q. You said that was your position?

A. That is correct.

Q. In other words, your position is the 1-O position and not the 1-A-O position, is that correct?

A. That's right.

Q. Did you have a chance at this hearing to dis-

(Testimony of Bernard Henry Ashauer.)

cuss with them and explain the 1-O position that you took? A. This is before the——

Q. The local board? A. No, I didn't

Mr. Tietz: You may cross-examine further.

Mr. Mitsumori: I don't believe I have any further questions.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: That, your Honor, is the defendant's case. I have no more testimony to offer.

At this time I wish to renew the motion that I made at the close of the government's case and to merely restate and not reargue the points I made then. [34]

First, that the file itself shows from the appeal statement made by the registrant that there was prejudice exhibited at the personal appearance hearing.

Second, his appeal statement shows that introduction of evidence at the personal appearance hearing was forbidden.

Three, that he was reclassified from class 4-E, which had been given him on January 16, 1951, to 1-A on November 20, 1951, without any new evidence to give the board jurisdiction.

The fourth point I made was that both the hearing officer in his advisory opinion and the Attorney-General in his recommendation to the appeal board based the opinion in the first instance on something else, and in the second instance on an illegal basis.

namely, that since he believed in self-defense, he couldn't qualify for a conscientious objector classification.

The fifth point I made was that the classification in 1-A, after he had been given a 4-E, was an arbitrary act, and the appeal board in sustaining that point committed an arbitrary act.

Now, with the court's permission, I wish to add a sixth point to that first group of points. It should properly have been made before. Somehow I overlooked it. I ask the court to consider this point, and that is that the file itself shows, and I could add that the testimony of the witness corroborates it, but it is not needed, the file itself is sufficiently [35] self-explanatory to show that these two pages, 20 to 21, are the only two documents that explain his position authoritatively, which he says is his position, and they refused them, they did accept two of them because they were thin ones, but they did not send them to the appeal board. They sent only the cover sheet of one and the cover sheet and back page of the other. I won't argue that point now, although it is a new one. I will argue it a little bit later in connection with the four additional points I wish to present which grow out of the defendant's testimony.

The Court: Let's dispose of the first group of points. Your motion is denied. Now you can go ahead and argue the other points.

Mr. Tietz: The first point is that at this personal appearance hearing they did not permit him to adequately and fully discuss the issues of the case.

The Court: Now, Mr. Tietz, there are cases which I have read which point out the fact that it is physically impossible for the local board to give to these people all the time that they think they are entitled to. There has to be some limitation.

Mr. Tietz: I agree.

The Court: Even in this court we don't give attorneys all the time they think they are entitled to to argue points of law. The fact of the matter is I can very easily say to you [36] now that I don't want to hear any more argument and cut you off.

Mr. Tietz: Your Honor would never do that.

The Court: I probably wouldn't, but I understand some of the judges do.

Mr. Tietz: Oh, I think it is error if it is done in that way and at that time. I think that counsel has a right to have a hearing from a court.

The Court: But suppose I say to you, "Mr. Tietz, you are just arguing and rearguing matters you have argued in other cases. I have held against you in other cases and I don't want to hear this argument any more."

Mr. Tietz: If I were trying to burden the court and belabor the same point, repeat myself, then I agree the court would be thoroughly right in saying, "I am sick and tired of hearing J. B. Tietz." Your Honor has never said it and I don't think he will. I hope you don't have to.

(Further argument of counsel.)

Mr. Tietz: My next point is that he presented them with two or three pamphlets and they utterly

refused to receive them, to consider them. My point is they can't do that. If he came to them with a truckload of material, they could say, "You are trying to swamp us and you are unreasonable," but when he comes to them with two or three pamphlets and says, "These explain my position," they should receive them.

The Court: You hold that argument until tomorrow morning [37] and we will find out from the clerk whether or not he did present any other pamphlets. All we have so far is his testimony.

Mr. Tietz: That's very good. Now, shall I continue with another point?

The Court: Yes.

Mr. Tietz: My other point is—I have two more points, but this is the next point—that when a Selective Service local board member says to a registrant, "I have three sons over there, there is no reason why you shouldn't be there," he is not exhibiting the judicial attitude that these men who are sitting as judges should exhibit, and then when another one leans over and points his finger at him and says, "You are yellow"—that may be disputed and now we have the opportunity to know, to have him here.

The Court: You may continue those arguments until we get the clerk here and we will have the version of the clerk. All we have got is the testimony of the defendant.

Mr. Tietz: That's all we have in our case. I did not keep them from bringing in the board members.

As a matter of fact, they called me up and said, "Won't you please stipulate and not cause the government the expense," and I say, "Sure, I will be accommodating."

The Court: They probably did not know how serious this was. [38]

Mr. Tietz: The last point I would like to present and to argue, and if the court would like a memorandum I would be happy to present one, is this. When the hearing officer at the start of the hearing lets him know that he will not be given the information that is necessary for a man to have to defend himself, the names of the people who said these things about him so that he can point out if it is true the man has a grudge against him or the man doesn't know him, he doesn't know who his accusers are, he is denied due process of law.

The Court: I think you have argued that before.

Mr. Tietz: That is by implication of the full FBI report.

The Court: I don't think that the defendant is entitled to see the report. He is entitled to, if he asks for it, to have a resume of the information.

Mr. Tietz: That is within the Nugent decision. What is a resume? If a resume doesn't give you who says the things, how can you meet it?

The Court: I don't know whether a resume goes that far.

Mr. Tietz: I am asking your Honor to decide, when they didn't let him know who said these bad things about him, he was not given a full resume.

The Court: I will rule against you on that. We

will continue this until tomorrow morning at 10:00 o'clock. [39]

November 4, 1953, 10:00 A. M.

The Clerk: No. 23002, United States vs. Bernard Henry Ashauer.

Mr. Tietz: Ready.

Mr. Mitsumori: Ready.

The Court: This other case will trail and we will proceed with the Ashauer case.

Mr. Mitsumori: I believe yesterday, your Honor, we concluded with my statement that I would have the original file, Selective Service file of the defendant, and also the clerk from that local board. I have Mrs. Lewis here.

Will you please come forward and take the stand, Mrs. Lewis?

MARY B. LEWIS

called as a witness herein by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please, and state your name?

The Witness: Mrs. Mary B. Lewis. [40]

Direct Examination

By Mr. Mitsumori:

Q. Mrs. Lewis, will you please state your occupation?

A. Well, I am clerk for Selective Service. I am

(Testimony of Mary B. Lewis.)

in charge of the Local Board 83 records in North Hollywood.

Q. What are your duties, what is the nature of your duties with Local Board 83?

A. Well, I have charge of all the girls that work in that office, I have to keep them trained.

Q. Do you have supervision and control of the files of all registrants with that Board?

A. All the registrants' files in that Board are under my jurisdiction, under my charge.

Q. Mrs. Lewis, you were requested by me to bring with you the original file, the registrant's file, Selective Service file, that is, of Bernard Henry Ashauer. Did you bring the original with you?

A. Yes.

Q. May I have it at this time?

A. Yes. (Handing file to Mr. Mitsumori.)

Mr. Mitsumori: I will ask the clerk at this time to mark the original Selective Service file of Bernard Henry Ashauer as Government's Exhibit 1-A.

The Court: It may be marked.

The Clerk: 1-A for identification, your [41] Honor.

(The file referred to was marked as Plaintiff's Exhibit No. 1-A for identification.)

Q. (By Mr. Mitsumori): I hand you at this time, Mrs. Lewis, the original file, Selective Service file of Bernard Henry Ashauer. Is that the original file kept in the custody of the local board which you represent of the registrant? A. Yes, it is.

Q. Mrs. Lewis, will you open up the file? I

(Testimony of Mary B. Lewis.)

will ask you at this time whether or not contained in the file there are two pamphlets, namely, the Watchtower, dated February 1, 1951, and also a pamphlet entitled God and the State? Are both such pamphlets contained there?

A. Yes, these pamphlets are both in the file.

The Court: Are they complete pamphlets?

The Witness: Yes, complete pamphlets.

The Court: Nothing has been deleted?

The Witness: No. They are all here.

The Court: All right.

Q. (By Mr. Mitsumori): Mrs. Lewis, I further ask you what is the procedure of the board, the practice of the board, when a registrant has appealed, the registrant's case has been appealed to the appeal board.

Mr. Tietz: Object, your Honor. What was done in this particular case is what we are concerned with. [42]

The Court: I don't think it is material what they usually do. It is what they have done in this particular case.

May I ask this witness a question?

Mr. Mitsumori: Yes. Go ahead.

The Court: Were you the clerk when the appeal was perfected in this particular case?

The Witness: I was not the clerk that did the work. I was in charge of the file, in charge of the records, but I was not the clerk that did the work.

The Court: Do you know of your own knowl-

(Testimony of Mary B. Lewis.)

edge what part of the file was sent to the appeal board?

The Witness: Yes, I do, because it is a custom and a practice——

The Court: I am not interested in the custom and practice.

The Witness: I signed the form, and I myself put this in an envelope and mailed it to the appeal board.

The Court: When you put the original file in an envelope and mailed it to the appeal board, were the two pamphlets in question with the file?

The Witness: They were.

Mr. Mitsumori: I have no further questions.

The Court: You have got another problem here, I think. The only evidence before the court is the statement of the defendant relative to what happened before the local board. When [43] you have this witness on the stand, shouldn't you go into that question?

Mr. Mitsumori: No.

Q. I will ask you, Mrs. Lewis, whether or not you were present at any local board hearing at which time the registrant was present?

A. No.

Q. On or about the 4th day of December, 1951?

A. No, I was not present.

Q. Who was the clerk of the local board at that time? A. Ann Van Blaricon.

Q. Do you know whether or not she was present of your own knowledge?

(Testimony of Mary B. Lewis.)

A. Well, she is the one who wrote up the meetings.

Q. Who wrote the minutes of the meetings?

A. Yes. She wouldn't be able to write up a summary of the happenings unless she was present.

Q. But you were not present? A. No.

Mr. Mitsumori: I have no further questions.

Cross-Examination

By Mr. Tietz:

Q. What did you say your present title is?

A. What was the question? [44]

Mr. Tietz: Please read it.

(Question read.)

The Witness: I am a clerk for Selective Service. I act as co-ordinator.

The Court: You are a clerk, but you are not the clerk?

The Witness: All the girls in the office are clerks and I am in charge.

The Court: There is one who is designated as the clerk?

The Witness: Well, Ann Van Blaricon was the clerk. We are all clerks.

The Court: Who has the official designation of clerk?

The Witness: Of clerk of this board?

The Court: Yes.

The Witness: A girl by the name of Laura Predzik. She was placed in charge of the board

(Testimony of Mary B. Lewis.)

edge what part of the file was sent to the appeal board?

The Witness: Yes, I do, because it is a custom and a practice——

The Court: I am not interested in the custom and practice.

The Witness: I signed the form, and I myself put this in an envelope and mailed it to the appeal board.

The Court: When you put the original file in an envelope and mailed it to the appeal board, were the two pamphlets in question with the file?

The Witness: They were.

Mr. Mitsumori: I have no further questions.

The Court: You have got another problem here, I think. The only evidence before the court is the statement of the defendant relative to what happened before the local board. When [43] you have this witness on the stand, shouldn't you go into that question?

Mr. Mitsumori: No.

Q. I will ask you, Mrs. Lewis, whether or not you were present at any local board hearing at which time the registrant was present?

A. No.

Q. On or about the 4th day of December, 1951?

A. No, I was not present.

Q. Who was the clerk of the local board at that time? A. Ann Van Blaricon.

Q. Do you know whether or not she was present of your own knowledge?

(Testimony of Mary B. Lewis.)

A. Well, she is the one who wrote up the meetings.

Q. Who wrote the minutes of the meetings?

A. Yes. She wouldn't be able to write up a summary of the happenings unless she was present.

Q. But you were not present? A. No.

Mr. Mitsumori: I have no further questions.

Cross-Examination

By Mr. Tietz:

Q. What did you say your present title is?

A. What was the question? [44]

Mr. Tietz: Please read it.

(Question read.)

The Witness: I am a clerk for Selective Service. I act as co-ordinator.

The Court: You are a clerk, but you are not the clerk?

The Witness: All the girls in the office are clerks and I am in charge.

The Court: There is one who is designated as the clerk?

The Witness: Well, Ann Van Blaricon was the clerk. We are all clerks.

The Court: Who has the official designation of clerk?

The Witness: Of clerk of this board?

The Court: Yes.

The Witness: A girl by the name of Laura Predzik. She was placed in charge of the board

(Testimony of Mary B. Lewis.)

just about two weeks ago. In other words, I have to designate girls to handle certain work.

The Court: I thought we were going to have the clerk of the board who had knowledge of this matter.

Mr. Mitsumori: I was under the impression we did have such a party here, but I understand the clerk is no longer with the board, that is the clerk that was the clerk during the period in question, that is during 1951 and 1952. Mrs. Lewis the coordinator. She has supervision over all the [45] clerks.

The Court: Well, I am satisfied with the testimony relative to what was sent to the appeal board, but we have a charge made by the defendant as to what they consider misconduct on the part of the board members. I have no reason to disbelieve the defendant. I am going to have to take his testimony as he gave it unless there is some testimony to the contrary. I supposed you were going to have this morning someone who would testify to what happened at the hearing. This witness can't.

Mr. Mitsumori: Our review of this case, your Honor, is strictly confined to the record in the case. We are certainly not required to and the law does not require us to produce board members or to probe into the mental processes of the board as to why they did that or how they did it.

The Court: I am not trying to probe into the mental processes, but do you mean to tell me when a clerk of a board writes up a summary of proceed-

(Testimony of Mary B. Lewis.)

ings before the local board that the defendant can't come in and testify as to proceedings that were not set forth in the summary? According to the summary that was filed in this case by the clerk or by the local board, there was nothing here relative to some of the testimony made by the defendant. Do you think a member of a local board has a right to say to a registrant, "You are yellow"? I think this is a serious charge. I think there should be some refutation in the record, if you can get some refutation. [46]

Mr. Mitsumori: I don't know whether I am going to be able to get it, your Honor.

The Court: This is a criminal case. If you don't get it, it may raise a reasonable doubt and I will have to find the defendant not guilty. This is not a habeas corpus case where the burden is upon the petitioner, but the burden here is upon the government to establish beyond a reasonable doubt. If the testimony of the defendant raises in the mind of the court a reasonable doubt relative to the conduct of the members of the board at the hearing, there is nothing I can do except find the defendant not guilty.

Mr. Mitsumori: Of course, the final step in this case was not confined to what happened at the local board. He was given a personal appearance hearing. He was given an opportunity to present his facts. He admitted that on cross-examination, that he was given an opportunity to present evidence, reasonable evidence, which he did, in the form of affidavits

(Testimony of Mary B. Lewis.)

and letters from friends to support his position. He was also given the opportunity of presenting those two pamphlets, which he testified he did. On direct examination he testified he was not given an opportunity to present any form of pamphlet, and yet on cross-examination he admitted yes, he was given an opportunity. I believe we went over the question of whether or not he could submit a truckload of pamphlets, also, at that time. After all, the regulations specify that material that [47] can be presented by the registrant must be as concise as possible. Certainly the board has that discretion.

The Court: I am not talking about the material at the present time. I am talking about the charge made here that the local board was arbitrary in the classification.

Mr. Mitsumori: Of course, the registrant after the hearing had taken place and after he had been classified 1-A by the local board, after the personal appearance, he had the opportunity of appeal, which he did, and he also had the presidential appeal. He had two appeals from the local board hearing. The question is whether or not the defendant was prejudiced, substantially, that he was denied procedural due process in his classification.

The Court: Mr. Tietz, the other day I rendered an opinion in the Lynch case, I think it was, in which I pointed out that the classification by the appeal board was an entirely new classification and I thought it corrected any errors that occurred and

(Testimony of Mary B. Lewis.)

it didn't affect the substantial rights of the defendant. Let's assume, just for the purpose of argument, that the local board was arbitrary, let's assume that they made the statements the witness said that they made. Nevertheless, they went ahead and made a classification. There was an appeal and there was a hearing before the hearing officer. The defendant testified he did appear before the hearing officer. The hearing officer reviewed the entire file, together with the [48] additional information, made his recommendation to the Department of Justice, and the Department of Justice made the recommendation to the appeal board, and the appeal board followed that recommendation and reclassified him. Under the Lynch case, is it material whether or not the board was arbitrary?

Mr. Tietz: Yes, sir, for this reason. The registrant is entitled to due process of law at every step of the proceeding. He is entitled to a fair deal.

The Court: I understand that you like the Lynch case.

Mr. Tietz: Oh, no.

The Court: You can't like part of it and dislike another part.

Mr. Tietz: What your Honor did in the Lynch case was to rely on the Eighth Circuit decision, and that is the part that is bad, because it leads your Honor astray on these other matters.

The Court: Since that time, Mr. Tietz, if I was rewriting that, I have found two cases in the Ninth Circuit that come to the same conclusion. I based

(Testimony of Mary B. Lewis.)

my opinion upon the Tenth Circuit case, I think it was, but, however, the Ninth Circuit says the same thing.

Mr. Tietz: Not altogether. It is unquestionably good law and it is the law in the Ninth Circuit, that on questions of fact the decision of the appeal board is final, unquestionably. However, the decision by an appeal board can never cure [49] an illegality below.

The Court: Well, I disagree with you. If there was something done by the local board that does not affect the substantial rights of the defendant, the decision of the appeal board is final and it wipes out any defects. Now, however, the thing I was interested in in this case is that all the evidence was not sent to the appeal board.

Mr. Tietz: That is one thing.

The Court: If the appeal board didn't have all the evidence, then, of course, the decision of the appeal board wouldn't wipe out the defect, if there was a defect, in the local board. But it appears now that the evidence did go up, although the record didn't show it went up, but it appears the evidence did go up.

Mr. Tietz: In the first place, I am not through cross-examining, and it may not be a fact in the Court's mind that it did go up. The Court may have doubt about that.

The Court: Now you can proceed with your examination.

Mr. Tietz: Thank you.

(Testimony of Mary B. Lewis.)

Q. Your duties are to supervise the work of how many boards? A. Five.

Q. Five boards. Those five boards have what the social workers would call a case load of 35,000 registrants, don't they? [50]

A. The five boards, yes.

Q. This personal appearance hearing was on December 4, 1951, wasn't it?

A. I haven't checked. On December 4, 1951?

Q. You were not present? A. No.

Q. On December 14, 1951, the cover sheet was sent to the appeal board, right?

A. That's right.

Q. During the month of December, 1951, how many appeals did you have any part in forwarding to the appeal board, can you tell us? A. No.

Q. Back in those days, you had quite a number of appeals, did you not?

A. Well, we still do. I suppose we had them, yes.

Q. Didn't you have more appeals during that month than almost any other month?

A. I wouldn't know that.

Q. Isn't that the month when the board started the bookkeeping shift from 4-E to 1-O, and all these young fellows were concerned about it?

A. I haven't checked that. We have other appeals besides the 4-E and 1-O.

Q. How many appeals would you say you have had to look [51] over in the last two years?

(Testimony of Mary B. Lewis.)

A. Well, I have never counted them, so I wouldn't know.

Q. Aren't any records kept of the number of appeals that go up from these boards?

A. We keep no record of the number that go up, no.

Q. So you can't tell us whether there were 200 or 300 appeals from all these boards together out of these 35,000 registrants?

A. I wouldn't have any idea how many went up during that month. That seems like a large number, but I never kept a record of it.

Q. When you look at this exhibit that is before you, the original file, can you see any place there where you checked off by initial or any other way the documents that actually went up to the appeal board?

A. No, because I don't check them off.

Q. You don't check off the documents that go to the appeal board?

A. No. I would have to look at every one, if I did. That is the reason we would have a——

Q. There is no way you can tell us that you kept a record of what went to the appeal board or didn't go?

A. I know we keep nothing out, the entire file is mailed.

Q. That is the general practice? [52]

A. It was the practice in this case, also.

Q. You mean you actually did it in this case?

A. You mean sent the whole file?

(Testimony of Mary B. Lewis.)

Q. Yes. A. Certainly, we did.

Q. Did you send what is called the out-file, the secret interdepartmental communications?

A. We have no secret out-file on this. When a file is sent to the appeal board, the whole file goes and we merely keep a copy of the 120.5 form. That stays in the out-file, because we have to have a record of where the file is. That is our record that we have sent the file to the appeal board.

Q. You mentioned you do have an out-file. What is this out-file?

A. It is just a charge-out sheet.

Q. A sheet?

A. Yes. It says "Out," and carries the name and number of the registrant.

Q. And has a folder still on?

A. Not necessarily, no. The only thing it would have in it would be that 120.

Q. How do you find this sheet called out-file?

A. Well, it is filed right where the file would be filed if it was in the office.

Q. When a registrant comes to your office and says, "I [53] want to make a copy of my file," do you give him everything that is in the file so he can copy it? A. Yes, we do.

Q. Do you know and does your file reflect whether or not this defendant, Bernard Henry Ashauer, came to the office of your group of boards in the fall of 1953 and asked to copy his file for his lawyer?

(Testimony of Mary B. Lewis.)

A. I do not know. I have no record of whether he did or did not.

Q. Isn't there any record of it there?

A. Well, this file, there is no record here, no, of that.

Q. Aren't you required to keep the record of the individual action in coming in and asking to make a copy of his file?

A. Not necessarily, no. Sometimes we do, sometimes the clerks do. It isn't required we make a record that he came and asked for his file.

Q. Do you know whether or not there is a record in your file that he came to the office and asked to make a copy of the file?

A. I have no record of it in this file.

Q. Do you recall it was done?

A. No, I don't. I talk to so many.

Q. Do you know whether or not on the occasion when he [54] came there and he was given the file to copy, that certain portions of the file which you have in front of you now, these two booklets, were not in the file?

A. I don't ever remember of him coming there, so I wouldn't know.

Q. That is what I am asking.

A. But these two booklets have been in the file all the time. They have never been removed.

Q. Would you repeat that, please?

A. These two booklets have been in this file. They have never been removed.

(Testimony of Mary B. Lewis.)

Q. You can testify to that of your own knowledge? A. Yes.

Q. Are you the only one that has access or control over the file?

A. Well, I am not, no, but my girls have been instructed they are not to remove anything like that from the file.

Q. Then you mean you have instructed them to follow the regulations and not take anything out of the file, is that right?

A. Certainly. They know that.

Q. Did you have anything to do with the photostatic copy of this file?

A. With the photostatic copy of the file—— [55]

Q. With making it or ordering it?

A. No, I did not.

Q. You mean one of the girls takes care of it?

A. We mailed the file out for photostating.

Q. You mailed it out?

A. No, I don't know that I did, no. It might have been mailed out by one of the girls. That I don't know. I don't remember who mailed it out. It is entered on the back that it was mailed out.

Q. You are willing to testify of your own knowledge these two pamphlets were in the file at all times after December 4, 1951, is that right?

A. After December 4, 1951?

Q. Yes. A. Yes.

Q. And that is the date of the personal appearance hearing? A. That's right.

Q. You haven't any doubt about that?

(Testimony of Mary B. Lewis.)

A. No, I haven't.

Q. That they were there at all times?

A. I have no doubts but what they were there at all times.

Q. Are these files kept in a locked file drawer?

A. Not until after they are—not all the files. They [56] are after they are reported as delinquent, then they are kept in a locked file.

Q. Before that, they are in a great mass of open files? A. That's right.

Q. To which the clerk of the local board and everybody in the office has access?

A. That's right.

Q. Where are these locked files?

A. They are right there in the office.

Q. Where all the other files are?

A. They are right there in the office with the other files.

Q. Isn't it a fact when a person comes and asks to see his file or the file of his client, that he is generally met with a statement, "It will take us a few minutes to get the file in order"? A. No.

Q. You have used that statement and nobody at your board has used that statement?

A. No. We never have to get the files in order. They are in order all the time, a continuous thing.

Q. You mean the file is always complete and everything is in it that should be except the last day or two mail, right? A. That's right. [57]

The Court: Any other questions.

Mr. Tietz: No.

(Testimony of Mary B. Lewis.)

Mr. Mitsumori: No questions.

The Court: May this witness be excused?

Mr. Mitsumori: Yes.

Mr. Tietz: Yes.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: The defendant requests permission to reopen his case and take the stand again.

The Court: Well, just a minute now. Do you have any other testimony?

Mr. Mitsumori: No, I have no other testimony. I will offer Government's Exhibit 1-A into evidence.

The Court: It may be received in evidence.

Mr. Mitsumori: It is stipulated by counsel this may be withdrawn at the conclusion of these proceedings? Mr. Tietz has offered to place in the photostatic copy of the file a full and accurate duplicate copy of the Watchtower and the God and the State pamphlet.

The Court: It may be withdrawn when Mr. Tietz provides a copy of the enclosures.

Mr. Mitsumori: Very well.

The Clerk: It will be marked 1-A in [58] evidence.

(The exhibit referred to was received in evidence as Government's Exhibit No. 1-A.)

The Court: All right, Mr. Tietz, I will grant your motion to reopen.

Mr. Tietz: Thank you. Mr. Ashauer, will you take the stand again?

BERNARD HENRY ASHAUER

the plaintiff herein, having been heretofore duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Tietz:

Q. Mr. Ashauer, I will hand you three small pamphlets, about 5 by 6 inches in dimensions, with a thickness each of about 1/8 of an inch, one entitled Neutrality, one entitled Loyalty, one entitled Jehovah's Servants Defended, and ask you if you can identify them.

A. These are the three books that I wanted to have in my file and they were the ones that they refused to put in.

Q. You mean at the personal appearance on December 4, 1951, before the local board?

A. That's right.

Q. Are those the exact ones or are those duplicates, or what?

A. No, these are the exact ones, because I had them [59] marked a little bit so if they would read through them, they could see a few of the pencil marks in there.

Q. Are they in the same condition, substantially, that they were on the day that you offered them to them? A. Yes.

Q. All the pages are there, no pages added?

A. No.

Mr. Tietz: I ask that they be marked for identification as Defendant's Exhibits A, B, C——

(Testimony of Bernard Henry Ashauer.)

The Clerk: It would be C, D, and E, your Honor.

The Court: C, D, and E, they may be marked.

The Clerk: Defendant's Exhibits C, D, and E for identification, so marked.

(The pamphlets referred to were marked Defendant's Exhibits C, D, and E for identification.)

Mr. Tietz: I ask that they be admitted in evidence.

The Court: They may be received in evidence.

The Clerk: C, D, and E in evidence, so marked.

(The pamphlets referred to were received in evidence and marked Government's Exhibits C, D, and E.)

Mr. Tietz: There is one other matter. May I confer with my client? He told me something and I forget what it was.

The Court: All right.

(Short interruption.) [60]

Q. (By Mr. Tietz): When you employed me to act as your lawyer in this prosecution, I told you to go to the local board office and make me an exact copy of the file that they had there on you, didn't I?

A. That is correct.

Q. Did you go there? A. Yes, I did.

Q. Did you see your file? A. Yes, I did.

Q. I am going to hand to you Government's Exhibit 1-A and ask you if this is what you saw when you were there. Let me interrupt my own ques-

(Testimony of Bernard Henry Ashauer.)

tion. About what date did you go to the local board to make this copy?

A. Well, that I don't know. It is the date I came to your office and you told me to go down there the next day to get the file ready.

Q. You came to me after you were indicted?

A. That is correct.

Q. It was some time in August, 1953, then.

A. Yes.

Q. Do you have in mind the question I asked you, if that was the file that you found at the local board?

A. I found everything in it but this here. When I was there, they handed it to me piece by piece and said I could copy what I had to have, and that I had to return it piece by [61] piece. Then I was speaking to this particular lady here and she turned the file over like this and says if there is anything else I would want, and I took what I thought I had to have for you, and these booklets here I didn't see. That is why I asked you if this was the file.

Q. When you say "these booklets here," will you give us the names and pagination of them?

A. God and the State.

Q. What page is that? 20 and 21, isn't it?

A. This is 20, and the Watchtower is 21.

Mr. Tietz: You may cross-examine.

The Court: You say that the entire file wasn't given you as a whole, it was given you piece by piece or sheet by sheet?

The Witness: That is correct.

(Testimony of Bernard Henry Ashauer.)

The Court: Where were the sheets kept that weren't given to you?

The Witness: At first there was a girl that I had to take them sheet by sheet, and then I went up to this particular lady here and she had the file like this and she turned the file over and said, "You take out what you want and copy it, and as you copy it, you bring it back to me."

The Court: Did you take the entire file?

The Witness: No, I didn't. Piece by piece. She would turn it over like this and I would say, "I want this here."

The Court: How do you know that the two documents in [62] question were not in the file? You say you never saw them.

The Witness: The file was like this. She would be here and she would be turning them over like this, and I would say, "I would like to copy this," and she would say, "All right," and when I was through I had to hand them back to her.

The Court: All right.

Cross-Examination

By Mr. Mitsumori:

Q. Mr. Ashauer, going back to December 4, 1951, the personal appearance before the board, you stated you offered Defendant's Exhibit D, these three pamphlets? A. Yes.

Q. You offered those to the members of the local board, is that correct? A. That is correct.

(Testimony of Bernard Henry Ashauer.)

Q. Do you recall how you offered them when you handed them to the local board and to whom?

A. Yes. When I was there at the local board they told us, someone from our organization, "If you have something in your file that they could read, it would be better for your case." So I had pieces of paper, the affidavits, and I had these particular books, because they do sort of explain things that maybe I couldn't say as well, and like I said, I knew that I only had 15 minutes there, so I asked them if they would put [63] that in my file so if it had to go on any further, it would be in there, and they said no, they couldn't take that because it would be a little bit too bulky.

After I told them I thought it should be in there and I was going to call our lawyer, one of them said, "I think we'd better take these pieces of paper," and I think they took the Watchtower and this pamphlet with it, but I think the other three they refused to take.

The Court: Did you offer all five pamphlets together at one time?

The Witness: To be perfectly true, I don't really know. I offered some material when I was before Mr. Friedman, and he accepted some of it.

The Court: Who is Mr. Friedman?

The Witness: He is the appeal officer.

The Court: The hearing officer?

The Witness: Yes.

The Court: Let's go back to the local board. You

(Testimony of Bernard Henry Ashauer.)

went before the local board and you had five of these pamphlets?

The Witness: Right.

The Court: Your testimony is they accepted two and refused to accept three?

The Witness: I think so.

Mr. Mitsumori: Your Honor, he testified he wasn't sure how many he had. [64]

The Court: What I am trying to find out is, did you present all five to the local board?

The Witness: Well, as far as I can recollect. I like to say the truth. Yes, I think I did.

The Court: You don't know?

The Witness: Well, yes, I was up there, and as I can recollect there was five, and then when I went up before Mr. Friedman, I had some more.

The Court: Let's forget Mr. Friedman. I will come to him in a minute. You had five. Did you give the five into the hands of the local board?

The Witness: Yes, I did.

The Court: Did they examine the five?

The Witness: No, they didn't. They just says, "Well, we will take these." Then when I mentioned his name, they said, "We better take these pieces of paper," and they took the affidavits and two booklets.

The Court: What about the other three?

The Witness: They said, "You can take these home with you again. They will make the file too thick."

The Court: When you went before the hearing

(Testimony of Bernard Henry Ashauer.)

officer, Mr. Friedman, did you again offer these pamphlets to Mr. Friedman?

The Witness: No, I did not. I just offered him some affidavits.

The Court: You didn't offer the pamphlets to Mr. Friedman? [65]

The Witness: No.

The Court: But you offered him some affidavits?

The Witness: That's right, and he took them.

The Court: Mr. Friedman did not refuse to accept the pamphlets?

The Witness: No, he did not.

Q. (By Mr. Mitsumori): Mr. Ashauer, you said that you submitted five documents at the time of the local board hearing, is that correct? A. Yes.

Q. Among those five documents, what constituted those letters and affidavits from your supporting friends and those which constituted pamphlets and books?

A. I don't know what you mean.

Q. How many letters or affidavits and how many books did you take with you at the time of the local board hearing?

A. Well, as I can recollect, I think there were three affidavits and those particular booklets [66] there.

Q. These three books here?

A. That is correct.

Q. How about the two that are contained in the file, the Watch tower and God and the State, when did you submit them?

(Testimony of Bernard Henry Ashauer.)

A. Well, as I can recollect, I think I had them at the same time.

Q. And you had more than five documents?

A. Well, yes, I guess so, if you want to call it that.

Q. You had eight. In fact, you submitted four letters and affidavits from supporting friends.

A. Well, they are in the file, yes, there are quite a few. Like I said, I can't remember if I gave them three at that particular time and then I had some when I had to go before the Appeal Board and I gave some. Like I say, it has been a year or so back.

Q. How many times would you say you made visits to the local board since you were classified 1-A by the local board back in 1951, including the local board hearing?

A. Well, I had 4-E, and I got that right away. Then I was made 1-A. Then I went there for my personal hearing, and I had my hearing, and I gave my evidence, and then I went before Mr. Friedman, and just went up the line. I guess it was only once.

Q. You only made one trip to the local [67] board?

A. And then, like I say, for the file, so it is twice, I believe.

Q. Where have these three pamphlets been kept since 1951, December, 1951? A. In my house.

Q. Are you positive that those are the same pamphlets that you had? A. Absolutely.

Q. You are absolutely sure of that?

A. Yes, I am.

(Testimony of Bernard Henry Ashauer.)

Q. Can you tell us, as nearly as you can recall, what board member refused to accept those three documents, three pamphlets, and what he said to you?

A. Yes, I could. There were three of them sitting there and one gentleman was doing all the talking. He was kind of an elderly man. I think his name is on the draft card. He is the one that done the signing. He said it would just make the file too full and he couldn't put them in the file.

Q. What did he say when you submitted the Watchtower and God and the State, those two pamphlets?

A. Like I say again, when I told him I was going to call Mr. Covington, the other gentleman, he says, "Well, I think we better take these for the file."

Q. They did take those in the file? [68]

A. They took those in the file when I said I was going to call the lawyer.

Q. They told you they didn't want to take them because they were bulky, is that correct?

A. That is correct.

Q. You stated sometime after you were indicted you were instructed by Mr. Tietz, your attorney, to go down to the local board?

A. That is correct.

Q. To examine your file, copy pertinent portions of the file? A. That is correct.

Q. What part of the file did you examine specifically now? By examining the original file before

(Testimony of Bernard Henry Ashauer.)

you, will you tell us what specific documents you copied and that you reported back to Mr. Tietz?

A. Yes, I can give them all to you.

Q. Which ones did you look at?

A. This one here—I took a look at all of them, as far as that goes, and I copied this one here, and this one, this Selective Service System, personal appearance, and then, like I said, I went through the file like this, and he told me to take the most important ones out that would pertain to the file and to the members of the Appeal Board.

Q. And is your testimony you didn't see the Watchtower [69] and God and the State?

A. That is correct.

Q. Did you look for them?

A. No, I didn't exactly look for them, but an object like this I am sure I would remember it when the file was turned over page by page.

Q. But you weren't looking for those two documents, were you? A. No.

Q. You are not positive whether they were in there or not then?

A. Well, as far as that, like I said, I didn't see them in there, no.

Mr. Mitsumori: No further question.

The Court: Any other questions?

Mr. Tietz: None, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: We have no objection to the govern-

(Testimony of Bernard Henry Ashauer.)

ment calling board members or any other available persons who were present to testify concerning the matters that transpired at the hearing.

The Court: Do you want to attempt to get in touch with any individual board members?

Mr. Mitsumori: If the court wishes that I have a board [70] member here, I will try to make such arrangements to do so, but I don't know whether it is necessary.

The Court: I am satisfied that if I hold against the defendant, hold he is guilty, there will be an appeal. In case there is an appeal, you have got the testimony of the defendant. There is no reason to say the defendant is not telling the truth. I don't know. I have nothing to justify such a statement as that. He is presumed to speak the truth. Then we have in the record only the statement made by the defendant. If the matter goes up on appeal, I would think it would think it would be important to have a statement from the board member as to what actually happened.

Mr. Mitsumori: I will arrange to have one board member. Will one be sufficient, Mr. Tietz?

The Court: You are not doing it for Mr. Tietz or for me. You are doing it for your record. Now, you make your record, because you will have to stand upon your record when it goes on appeal.

Mr. Mitsumori: This is a criminal proceeding. Of course, on the other hand, too, your Honor, in this type of a case we are merely confined, as well established by the case law, to the record in the case.

I don't want this case to go de novo again and have this court sit as the appeal board or the local board.

The Court: I am not going outside the record except [71] this, that if a defendant comes into court and says, "Sure, that is the record, but that is not the entire record. We presented something that is not in the record," then I certainly have a right to go into that matter, do I not?

Mr. Mitsumori: You mean some other matters, your Honor, that have been presented outside of the record?

The Court: We have got two problems that the court will have to decide. One problem is whether or not the board acted arbitrarily. Assuming it did act arbitrarily, then whether or not that has any effect upon the substantial rights of this defendant. The second problem is whether or not the board refused to receive the evidence as offered by the defendant. Now, it would seem to me if a registrant goes in to the local board and produces certain records and says, "I want this as part of the file," unless there is some pretty good reason, it should be made a part of the file. If they did make it a part of the file and it was never considered by the appeal board, then I don't think the decision of the appeal board would be binding, would be final. As far as I am concerned, I can decide this case upon the evidence before me, but I think for the benefit of the record that you really ought to get a member of the board here to testify to what actually happened at this hearing. At least you can get a conflict of the evidence.

Mr. Mitsumori: Well, yes. [72]

The Court: Maybe. I don't know.

All right, I will continue the matter to 10:00 o'clock tomorrow morning and trust you will be able to have a member of the board here.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., November 5, 1953.) [73]

September 24, 1953—10:00 A.M.

The Clerk: No. 23002, United States vs. Ashauer, further trial.

Mr. Mitsumori: We are ready to proceed, your Honor.

The Court: You may proceed.

Mr. Mitsumori: Mr. Pattison.

ANDREW K. PATTISON

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please? Will you please state your name?

The Witness: Andrew K. Pattison, P-a-t-t-i-s-o-n.

Direct Examination

By Mr. Mitsumori:

Q. What is your business or occupation?

A. Real estate investments.

Q. You are a member of the local Board 83, are you not?

A. That's right.

(Testimony of Andrew K. Pattison.)

Q. In Burbank?

A. North Hollywood at the present time.

Q. How long have you been a board member of that local board? A. I believe five years. [75]

Q. Were you a member during December, 1951?

A. Yes.

Q. Will you please tell the court what the nature of your duty is as a board member of that particular local board?

A. Well, we are to classify the registrants as to their classification, with regard to going into the Army, and we do that on the questionnaire that they fill out and the facts that are brought up before us, and one thing and another.

Q. Do you also conduct hearings before your board? A. Yes, we do.

Q. You sit as board members? A. Yes.

Q. When a registrant requests a personal appearance, do you not? A. That's right.

Q. Do you recall at this time, Mr. Pattison, whether or not a registrant in your board by the name of Bernard Henry Ashauer came before you and the members of your board for a personal appearance hearing on or about December 4, 1951?

A. Well, I couldn't recall it, no. It is two years ago. I wouldn't be able to recall that only by the records that would be available. I couldn't remember that. [76]

Q. If I showed you a copy or the original minutes of the board meeting of that day, would that refresh your recollection? A. Yes.

(Testimony of Andrew K. Pattison.)

Q. I will show you the original selective service file of Bernard Henry Ashauer, page 25 of the file, which is designated personal appearance, Bernard Henry Ashauer, Selective Service, December 4, 1951, and at the top board members present, and a Mr. Pattison is listed. Are you that Mr. Pattison?

A. Yes, I am.

Q. Will you examine that page, Mr. Pattison, and I will ask you whether it would refresh your recollection as to the hearing and the appearances there.

A. Well, yes. I would say that is right. We were all present.

Q. Does the minute reflect correctly, as nearly as you can recall, what took place at the personal appearance?

A. Well, no. I wouldn't say I could remember everything that took place at that time. We have 12,000 names to go over and all kinds of personal appearances, and over a period of years I can't remember exactly what took place, no.

Q. You wouldn't remember the defendant on trial in this case, would you?

A. Well, I wouldn't swear to it. No, I don't believe [77] so.

Q. How many personal appearances have you sat in on, Mr. Pattison, during the course of your service with the local board?

A. Maybe an average of probably maybe 50 a year for five years, probably 250, I would say, a

(Testimony of Andrew K. Pattison.)

rough guess of 250, maybe 300. That is not persons, that is days. During each one of those days we might have had as many as five or ten people.

Q. When a registrant appears before the board for a personal appearance, would you tell the Court how the hearings are generally conducted?

A. The first thing the chairman——

Mr. Tietz: If the Court please, I do not think we are so much concerned with the general practice as we are with what happened to this particular registrant.

The Court: Overruled. He may answer.

The Witness: At this particular session, Mr. Douglas, who was the chairman at that time, he generally swears in the registrant. After that, why, he calls him by name and tells him to tell his story.

Q. (By Mr. Mitsumori): Who was present at the personal appearance hearings besides the board members? A. The clerk.

Q. The clerk? [78]

A. At that time it was Ann Van Blaricon.

Q. She is no longer clerk? A. No.

Q. And who usually conducts the hearing?

A. Generally the chairman does. They ask, the registrant tells his story. After he gets through, any one of the other members might ask him a question.

Q. Is the registrant generally advised in any manner by the local board?

A. If he is appealing his case, we tell him when he is through, if there is anything else he wants to put in the file in the way of letters, writing, or any

(Testimony of Andrew K. Pattison.)

other thing that might help him, he must get it in the file, because if it goes to the appeal board, the file is the only thing that they go by, that is not a personal appearance.

Q. To your knowledge, from your experience as a board member and having sat through many board hearings, as you have testified, has the board at any time refused, to your knowledge, to accept pamphlets, books, or any writings that would be offered by the registrant? A. No, we have not.

Mr. Tietz: I am objecting, your Honor, to the line of questioning that goes to the usual practice and I would like a continuing objection.

The Court: You may have a continuing objection and the [79] same ruling. Overruled. We have here a witness who, because of the number of cases, cannot recollect.

Mr. Tietz: I beg your pardon? I did not hear.

The Court: We have here a situation where the witness, because of the number of cases the local board handles, cannot recollect distinctly each individual case.

Mr. Tietz: I realize the difficulty.

The Court: That is natural.

Mr. Mitsumori: We are only trying to help out the court.

The Court: When I was in Internal Revenue, I used to say I only knew two classes of employees, the very good and the very bad. The general run of employees I never knew. They had to do something to attract my attention. If anything happened to

(Testimony of Andrew K. Pattison.)

attract this witness' attention, he would probably remember it, but if there wasn't anything out of the ordinary, he wouldn't remember. So your objection is overruled. I think this is the best evidence we can get.

Mr. Tietz: I object, of course, as to the relevancy and competency. That it may be the best is another matter, your Honor.

The Court: Objection overruled. Will you read the question, the last question?

(Question read.)

The Court: Now will you read the answer, if there was an answer? [80]

(Answer read.)

Q. (By Mr. Mitsumori): Do you recall, Mr. Pattison, to your knowledge, from sitting as a board member, where any board member has made any derogatory statements or an accusatory statement as to the state of mind or the character of the registrant?

A. No.

Mr. Mitsumori: I have no further questions.

Cross-Examination

By Mr. Tietz:

Q. You have been asked a number of questions concerning the usual procedure and conduct of these appearances before the local board by registrants. You have told us that you have attended perhaps 250 appearances, multiplied perhaps by five or ten

(Testimony of Andrew K. Pattison.)

each day. Am I correct in my figures that there have been 50 of these days a year for five years?

A. That is once a week, isn't it, 50 a year?

The Court: Approximately.

The Witness: That is what I meant, that's right.

Q. (By Mr. Tietz): And you had five to ten of them a day?

A. No, I didn't say five to ten. Sometimes as many as ten. Sometimes only one.

Q. So there is a minimum of 250 of these appearances [81] and there might be as many as 500 or 1000 of them, the appearances that you have had in the 5-year period?

A. Could be, yes. I don't want to make a statement of the exact amount but, of course, that is approximately it.

Q. We are dealing with approximations.

A. That's right.

Q. Can you give us an approximation of about how many of them were Jehovah's Witnesses?

A. No, sir, I couldn't.

Q. Are they more numerous than any other identifiable group at the personal appearances?

A. No, I don't believe they are.

Q. Are there many of them?

A. Yes, there are quite a few of them.

Q. Would you say that of the total number over all these years you have had perhaps 50 of them?

A. I wouldn't say without going out and checking over the records before I would make that statement.

(Testimony of Andrew K. Pattison.)

Q. But it does stay in your mind that you have had a considerable number? A. Yes, we have.

Q. Can you recall anything of this personal appearance of Bernard Ashauer after looking at the file?

A. No, I can't recall that exact meeting, no.

Q. If I gave you some pamphlets, one entitled God and [82] the State, a 32-page pamphlet, one a little magazine entitled The Watchtower, dated February 1, 1951, if you looked at them, would they mean anything to you?

A. Well, I have seen a great many of these Watchtower magazines, yes. I don't know how many of these other. I wouldn't know whether I have seen any of them, but I have seen that Watchtower magazine a great many times, yes.

Q. Can you recall if you ever saw either of these two before December 4, 1951?

A. I have seen them in practically every file of a Jehovah's Witness, that is about all I can say. I can't say any individual one, but they are generally in all the files of Jehovah's Witnesses.

Q. Have you seen other pamphlets or little magazines other than these in Jehovah's Witnesses files?

A. I don't know whether I have or not.

Q. What makes you believe that you saw those two?

A. The Watchtower is one that they sell on the corner, that is one that looms up more than any one in my mind. That is the reason I say that, be-

(Testimony of Andrew K. Pattison.)

cause it stands out more. I have seen that a great many times.

Q. Do you recall if there is anything unique or significant about that particular one that is before you, dated February 1, 1951? A. No. [83]

Q. It says in its front it is a semi-monthly publication. Do you recall whether you have seen more than one different issue?

A. You mean do I read the dates on each one of them?

Q. Yes. A. No, I don't.

Q. Do you read what is in them?

A. I have gone through them, but I can't say I made a study, no.

Q. Have you gone through every one that has been handed to you? A. No.

Q. You mean that some of these that have been handed to you, you haven't gone through?

A. I haven't read them, that is correct.

Q. Can you tell us whether or not you read that particular one?

A. No, sir, I could not tell you that.

Q. When I say that particular one, I mean that issue of February 1, 1951.

A. No. I am sorry. I didn't read the dates on that, no.

The Court: Can you look at the document and tell us whether or not you have ever read it?

The Witness: Well, he mentions the date on it. I don't [84] know whether I ever read that issue there.

(Testimony of Andrew K. Pattison.)

The Court: Look on the inside and see what the inside says.

The Witness: But I have read——

The Court: The question is, have you ever read that document as a whole.

The Witness: With the name Watchtower on the outside, yes, I have read one of them.

The Court: This is a publication which is published semi-monthly or twice a month.

The Witness: Yes, sir.

The Court: Now, whether you have ever read one is not the question. The question is, have you read this particular one.

The Witness: Well, I don't know whether I have or not.

The Court: Can't you look at it and say whether or not you recollect any of the contents?

The Witness: No.

Mr. Mitsumori: Your Honor, I am going to object to further questioning along the lines of whether or not the board member read this particular issue. I don't think it is relevant in this case. I think counsel is attempting to lay a foundation to probe into the mental processes of the local board member, which goes to the question of classification.

The Court: I think it is a more serious problem than [85] that. If a registrant comes before a board and presents affidavits, publications, is the board supposed to read them? They certify they have considered them. Can they consider them without reading them? Is it a duty of the board to consider

(Testimony of Andrew K. Pattison.)

everything that is presented by the registrant. If it is, about all the board would do is read. Is it necessary?

The Witness: We read all letters.

The Court: And affidavits?

The Witness: Yes.

The Court: But you don't read all pamphlets?

The Witness: We don't read every one of them, no. We wouldn't have time to read them all.

The Court: You may continue.

Q. (By Mr. Tietz): Then you are reasonably certain, to the best of your recollection, that you have never read that particular one that is in front of you?

A. I won't say yes, whether I have or haven't. I just can't answer that question.

Q. You want to help us. Have you ever read any publication of the Watchtower dated February 1, 1951? A. I don't know.

Mr. Mitsumori: He said, your Honor, he couldn't recall whether he read it or not.

The Court: He says he doesn't know.

Mr. Mitsumori: He says he couldn't recall whether he [86] did read or didn't read that particular issue. Counsel is merely repeating the question.

Q. (By Mr. Tietz): Now, may I present to the witness for his inspection Exhibit D, consisting of three publications called Loyalty, Neutrality—

The Clerk: C, D, and E, Mr. Tietz.

Mr. Tietz: D bears the clerk's stamp. Oh, yes,

(Testimony of Andrew K. Pattison.)

they all bear the stamp right upon the publication. I will withdraw what I have said and reframe the question, with the court's permission.

Q. I will present to the witness, then, Exhibit C, which is entitled Jehovah's Servants Defended, Exhibit D, which is entitled Loyalty, and E, which is entitled Neutrality. Will you please look these over?

A. All right.

Q. You have had an opportunity now, Mr. Pattison, to look over these pamphlets. Are they at all familiar to you?

A. No, I can't say that they are.

Q. Are they either familiar or unfamiliar to you in the same sense that the other two publications, the Watchtower of February 1, 1951, and the other one, God and the State, are?

A. They are just not familiar, that's all. I don't know in what connection they are not familiar, but they are not familiar. [87]

Q. Do you recall if you have ever seen anything like that? A. Yes, it is possible that I have.

Q. Do you recall that you have ever read any part of those?

A. No, I can't say that I can recall.

Q. Do you know that the defendant in this case says that at the personal appearance that he had with the local board on December 4, 1951, he offered some things to the board and the board received some but wouldn't receive others? Do you know that he claims that? A. Well, does he?

(Testimony of Andrew K. Pattison.)

Q. I am asking you if you know that is a claim that he is making?

A. I believe Mr. Mitsumori made that statement, yes.

Q. You knew when you came here that he claimed some things were accepted by the board and other things were refused by the board?

A. Yes.

Q. Isn't it a fact that at this particular meeting one of your board members named Pattison did almost all the talking?

A. I don't believe that is a fact, no. In fact, it is not a fact, I will say that.

Q. At this particular meeting? [88]

A. That's right, or at any meeting, do I do all the talking.

Q. I am sorry. You are Mr. Pattison.

A. Yes, sir.

Q. I take all that back. I didn't mean you. So far you gentlemen are just names to me and I got my notes switched. I am referring to Mr. Tippet, T-i-p-p-e-t. What I asked you about Mr. Pattison I mean to refer to Mr. Tippet. Isn't it a fact that at this meeting he did most of the talking?

A. At this meeting, I wouldn't say, but I will go back to generally again. Generally he doesn't. When Mr. Douglas is there, he was the chairman. He is not on the board any more, but at this time he was.

Q. Who isn't on the board any more?

(Testimony of Andrew K. Pattison.)

A. Mr. Douglas.

Q. Who is the chairman now?

A. Right now I am acting as chairman.

Q. Did Mr. Pattison at that time have three sons in the service? A. He did not.

The Court: This is Mr. Pattison.

The Witness: I only had one in the service.

Q. (By Mr. Tietz): Did Mr. Tippet at that time have three sons in the service? [89]

A. I can't tell you whether he did or not.

Q. Have you ever heard him make such a statement?

A. I think all of us had sons in the service. At least I had one, and I am sure Mr. Tippet had one and I think Mr. Douglas did, but I can't tell you how many. I don't know.

Q. Was anything said at this meeting about Jehovah's Witnesses and the Flag salute?

A. I couldn't say.

Q. Do you recall at about this time there was another Ashauer that had a hearing before your board somewhat similar to this one, that it was an appearance before the local board?

A. I don't recall the names. I would have to check the records to see if that is the case.

Q. If I were to tell you that this defendant Bernard Ashauer has a brother named Rex Ashauer and he had an appearance before the local board a couple of months after this one, would that refresh your recollection? A. No, it wouldn't.

Q. Has there ever been a time when your board

(Testimony of Andrew K. Pattison.)

wouldn't let the registrant proceed to read from the Bible he said he wanted to read, or to present books he said he wanted to present?

A. No, I don't believe so. We generally encourage them to present all the things they can, but I don't believe [90] we ever stopped them from stating their story.

The Court: Do you limit them as to time?

The Witness: I mean we don't stay there all day, no. If they got off the subject, no, but we generally give as much as an hour. We have had them as long as an hour, I know that.

The Court: If a man comes in and wants to read to you portions of the Scriptures he thinks are pertinent, do you sit there and let him read as long as he wants to read?

The Witness: No, not as long as he wants to. We would stop him if he started on some sort of reading books like that. Naturally, we would stop them. But we generally let them—if there is any short paragraph in some book they want to read, we let them read it. We wouldn't take the time to read a whole book, no.

Q. (By Mr. Tietz): Have you looked at the records that you are required to keep, your office is required to keep, of what happened on this day?

A. No, I haven't. I haven't had time to go over this file. I didn't know anything about this until last night. I just got here about 15 minutes before court. I haven't had time to get it.

Q. Have you any way of knowing how many

(Testimony of Andrew K. Pattison.)

registrants you heard on these appearances before the local board on this day, December 4, 1951?

A. No. I would not know without checking. [91]

Q. Do you know whether you set any arbitrary time limitation on these appearances on this day?

A. No, I wouldn't.

Q. Do you know whether or not you set any arbitrary, meaning a definite time limitation on this particular defendant on this day? A. No.

Q. Do you mean, as far as you can recall, if he wanted to discuss the matter for an hour, you would have given him as much as an hour?

A. We have given registrants as much as an hour, that is correct.

Q. Is that true, that you have given them as much as an hour on days when you have had, say, as many as ten, or a considerable number?

A. No. You would know that we wouldn't be there ten hours.

Q. What is the most you have ever been at these personal appearance hearings, how many hours at a stretch?

A. You mean for appearances only?

Q. Yes, solely for that.

A. Oh, possibly four hours.

Q. Is that the maximum that you have handled these appearances in any one day?

A. We stay until we get through. We get there about [92] 9:00 o'clock in the morning. We leave when we get finished. Whether it is 11:00 o'clock, 12:00 o'clock or 2:00 o'clock, or whatever time it is.

(Testimony of Andrew K. Pattison.)

Q. Have you any way of telling, by looking at your records, how much time was given to this particular defendant? A. No, I don't believe so.

Q. For all you know, it might be rather short?

A. It could have been.

Q. If he wanted to discuss what was already in the file, could you have said to him, "We know that. Just give us something new"?

A. I don't believe so, no.

Q. What is your procedure when a registrant wants to go over a matter that is already in the file?

A. Should I say what our procedure is generally?

The Court: That is the question.

Mr. Tietz: I am opening the door.

The Witness: What was it again?

Mr. Tietz: I beg your pardon?

The Witness: What was the question, now?

Mr. Tietz: Will you please read it?

The Court: Read the question.

(Question read.)

The Witness: Well, I don't know exactly what you mean by that. If he already has a letter in there, and you mean [93] to allow him to read it again, is that what you mean?

Q. (By Mr. Tietz): No. Suppose he comes to you and he says, "You gave me a 4-E on the basis of what I told you on Form 150 and all the other material, and now all of a sudden, out of a clear

(Testimony of Andrew K. Pattison.)

sky, you give me a 1-A. What is the matter with my material? I feel the same way." What do you do then?

A. Well, then we check it over. We would.

Q. Will you check over this file and will you see if he has something in there on which you changed him from the 4-E to the 1-A?

Mr. Mitsumori: I will object to that question.

The Court: Sustained.

Mr. Tietz: Your Honor——

The Court: I don't think it makes any difference. I think the board has the right to change the classification any time.

Mr. Tietz: No, your Honor. I think if he, on the basis of some fact that is not a fact, he says that is the reason——

The Court: Objection sustained. I don't think it is material.

Q. (By Mr. Tietz): Are you able to tell us at this time why this registrant was changed from 4-E to 1-A?

Mr. Mitsumori: Same objection, your Honor.

The Court: Same ruling. The cases point out and the [94] regulations point out that it is the duty of the board to keep acquainted with the files, to go over the files, and if there is a change of condition, either by the registrant himself, or some other change, they can reclassify. Now, after reclassification, the registrant has a right to come in and question the reclassification. I don't think he has a right to question why.

(Testimony of Andrew K. Pattison.)

Q. (By Mr. Tietz): Do you recall that this registrant came in and questioned the change from 4-E to 1-A? A. No.

Q. You don't recall that?

A. I am sorry, but I can't remember something that took place two years ago.

Q. I agree with that.

A. My memory isn't that good.

Mr. Mitsumori: I believe Mr. Pattison has testified he could not recall the details of that particular personal appearance, because he had held so many during the course of the 5-year period, and therefore, he was merely testifying as to the general practice and procedure.

The Witness: That's all I can do. I can't remember each individual one. I don't believe anybody else could.

Q. (By Mr. Tietz): Records are kept of what is done, are they not?

A. That's right. That is the only thing I could go by [95] in this case.

Q. Aren't there records, in addition to what you have before you?

A. No. We have no secret records.

Q. Don't you have minutes of the meetings?

A. It is right in there. Anything that pertains to the meeting is in the file.

Q. Am I to understand you do not keep a Form 112 minutes, other than the minutes that are on the back of page 8?

(Testimony of Andrew K. Pattison.)

A. Not unless the office does. Our file is all we go by.

Q. Don't you know that the regulations require that? You mean if there are such records, you don't know?

A. Yes, I guess that is the answer.

Mr. Tietz: That's all. You may examine.

The Witness: Are you through with me?

Mr. Mitsumori: No. Does your Honor wish to question the witness?

The Court: No. I am through. May this witness be excused?

Mr. Tietz: Yes, except I desire to put the defendant back on for rebuttal.

The Court: Maybe you had better stay here until after we have the defendant on the stand. It might refresh your [96] recollection.

(Witness withdrawn.)

BERNARD HENRY ASHAUER

recalled as a witness in his own behalf in rebuttal, was examined and testified as follows:

Direct Examination

By Mr. Tietz:

Q. You have heard the testimony of the board member, Mr. Pattison, about the conduct of the appearance before the local board given you on December 4, 1951? A. That is correct.

Q. Do you recollect Mr. Pattison being at that meeting? A. Yes.

(Testimony of Bernard Henry Ashauer.)

Q. Do you recollect what part, if any, he took in the discussion?

A. Well, of the three board members, the one that did all the talking, I would say, not all, but—well, most of it, was Mr. Tippet.

Q. How much part did Mr. Pattison take in it?

A. Well, he asked a few questions, and Mr. Douglas asked a few questions, but actually most of the speaking was done by Mr. Tippet. [97]

Q. Did Mr. Douglas or Mr. Pattison exhibit any animosity of any kind toward you?

A. What do you mean by "animosity"?

Q. Did they have an attitude antagonistic to you?

A. No, those two were pretty good at the board.

Q. Did anybody there exhibit any attitude of antagonism to your ideas or beliefs?

A. Yes, Mr. Tippet.

Mr. Tietz: That's all.

The Court: Any questions?

Mr. Mitsumori: I have no further questions.

The Court: You may step down.

(Witness excused.)

Mr. Tietz: The defense rests, your Honor.

Mr. Mitsumori: The government rests, your Honor.

(Argument.)

The Court: There is nothing for me to do except to hold this defendant guilty, and I will so hold. Now you have a case in which you can test out the legality of the Lynch case, if you so desire.

Mr. Tietz: I presume that the Court will permit the defendant to remain on the same bond pending determination of the appeal? [98]

The Court: Well, I will allow the defendant to remain on bond until it is determined whether you want to appeal and file your notice of appeal, and at that time I will entertain a motion for him to remain on bond until the determination of the appeal.

Mr. Mitsumori: Is the court going to set a date for sentence?

The Court: Yes. I will set a date for the sentence. How long will it take you to perfect your appeal, if you decide to appeal?

Mr. Tietz: Well, it takes only a day to prepare the notice, your Honor.

The Court: Of course, you can't appeal until a judgment has been entered. I find the defendant guilty. Since this is a case without a jury, I think a judgment should be entered.

Mr. Tietz: I am satisfied that there is no reason the court can't proceed to pronounce judgment today. I don't think a probation report would be of any assistance to your Honor in this case.

The Court: I am not going to refer him to the probation department, because I assume this defendant doesn't have any past record, that he has a good record for being a law-abiding citizen, and the only thing against this defendant at this time is his religious belief in refusing to be inducted. [99]

Mr. Tietz: I am satisfied myself that is 100 per cent correct.

The Court: I am giving the defendant the benefit of all doubt. I am making it 100 per cent as far as past record is concerned.

Mr. Tietz: Could the court then at this time consider the matter of judgment and hear me on the argument for probation.

The Court: I will hear you.

(Discussion of counsel.)

The Court: Well, I am sorry, Mr. Tietz, but I just don't see how I can grant probation in any of these cases. That includes your cases, as well as the others. If this is an application for probation, it is denied. I will ask the United States Attorney about filing a formal judgment in this case. The defendant is ready to be sentenced. Can he be sentenced before a formal judgment is filed?

Mr. Mitsumori: Yes, your Honor. He can waive probation hearing.

The Court: He has made an application for probation and I have denied the application.

Mr. Mitsumori: It seems to me the court can pass judgment at this time.

The Court: I don't think there is anything to be gained [100] by postponing judgment. This matter is important enough to get it to the Circuit and the sooner I pronounce judgment, the sooner it will go to the Circuit.

It is the judgment of this court you be committed to the custody of the Attorney General for three years. My recommendation is you be sent to the work camp at Tucson, Arizona.

Mr. Tietz: Will the court entertain an oral motion for bail pending appeal? There is \$2,500 bond, and that is more than enough. He can get the same people.

The Court: I will allow him to remain on present bail until your notice of appeal has been filed. I don't think you can make an application for a bond on appeal until you have filed your notice of appeal.

Mr. Tietz: That may be technically correct.

The Court: So I will allow him to remain on bond until you file the notice, and when you file your notice, you come back in and I will pass on it at that time. I will stay the execution until after the notice of appeal has been filed, and after your application for bail pending appeal, provided it does not extend beyond November 23rd. That gives you two weeks and a half.

Mr. Tietz: I must get the notice in within 10 days, and I will make it in 2 days.

The Court: Then you can make the application for bail pending appeal. [101]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 31st day of December, A.D. 1953.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed March 22, 1954. [102]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain the original Indictment, Waiver of Jury, Stipulation, Judgment and Commitment, Notice of Appeal, Two Orders Extending Time to Docket Appeal and Designation of Record on Appeal, and a full, true and correct copy of Minutes of the Court for August 10, 1953; October 26, 1953; November 3 and 5, 1953, which, together with original Exhibits Plaintiff's No. 1 and Defendant's A to E, inclusive, and reporter's transcript of proceedings on September 23, 1953; October 26, 1953, and November 3 and 5, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 1st day of April, A.D. 1954.

[Seal] EDMUND L. SMITH,
 Clerk;

By /s/ THEODORE HOCKE,
 Chief Deputy.

[Endorsed]: No. 14304. United States Court of Appeals for the Ninth Circuit. Bernard Henry Ashauer, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 5, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14304

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class 1-A.

II.

The report of the hearing officer of the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board (that appellant be denied his conscientious objector status because of his belief in self-defense), were arbitrary, capricious and based on artificial and irrelevant grounds, contrary to the act and regulations.

III.

The appellant was denied the right to a full and fair hearing upon the occasion of the personal appearance before the local board in that he was denied the right to file a classification and offer new and additional evidence to the board and because the board demonstrated its prejudice against him.

IV.

The selective service system lost jurisdiction to order him to report for induction because it reclassified him into Class 1-A, on November 20, 1951, from the deferred class IV-E, without any new evidence to give it jurisdiction to act.

V.

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the bona fides of appellant's conscientious objector claim.

VI.

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

VII.

The Department of Justice and the board of appeal deprived the defendant of his procedural rights

United States Court of Appeals
for the Ninth Circuit

No. 14304

BERNARD HENRY ASHAUER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class 1-A.

II.

The report of the hearing officer of the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board (that appellant be denied his conscientious objector status because of his belief in self-defense), were arbitrary, capricious and based on artificial and irrelevant grounds, contrary to the act and regulations.

III.

The appellant was denied the right to a full and fair hearing upon the occasion of the personal appearance before the local board in that he was denied the right to file a classification and offer new and additional evidence to the board and because the board demonstrated its prejudice against him.

IV.

The selective service system lost jurisdiction to order him to report for induction because it reclassified him into Class 1-A, on November 20, 1951, from the deferred class IV-E, without any new evidence to give it jurisdiction to act.

V.

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the bona fides of appellant's conscientious objector claim.

VI.

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

VII.

The Department of Justice and the board of appeal deprived the defendant of his procedural rights

to due process of law. This the Department of Justice did by not mailing a copy of its recommendation to the defendant and giving him an opportunity to answer the adverse recommendation before forwarding it to the appeal board. The appeal board did this by considering the final classification of the defendant without sending to him a copy of the unfavorable departmental recommendation and giving him opportunity to answer it before it denied the conscientious objector status.

/s/ J. B. TIETZ,

Attorney for Defendant.

[Endorsed]: Filed April 15, 1954.

Affidavit of Service by Mail attached.